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No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHEVRON CHEMICAL COMPANY,
Petitioner

v.

RICHARD LEANDER FEREBEE, JR., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

The sale of paraquat—an important agricultural herbicide—is comprehensively regulated under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). Section 24(b) of FIFRA forbids a state from imposing "any requirements for labeling . . . in addition to or different from those required" by the Environmental Protection Agency ("EPA").

The D.C. Circuit held that, "while FIFRA does not allow states directly to impose additional labelling requirements," a state lay jury could hold a manufacturer liable for damages, and therefore indirectly control the sale of paraquat, on the ground that the label required by EPA was nonetheless inadequate.

In three separate instances, the D.C. Circuit also either ignored established Maryland tort law—and adopted a radically different view—or simply disregarded controlling legal precedent, refusing to certify these issues to the Court of Appeals of Maryland.

The issues presented are:

1. In view of Congress's command that no state shall "impose or continue in effect any requirements for labeling . . . in addition to or different from those required" by EPA—and EPA's expert determination that paraquat, as labeled, does not pose any adverse risk to man—does the Supremacy Clause forbid a state lay jury from imposing liability on a manufacturer of paraquat based on the alleged inadequacy of its label?

2. Was the Court of Appeals required under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), to certify its novel state law theories of causation and "regulation" to the Court of Appeals of Maryland for its decision under the state's certification statute?

PARTIES

The parties below were plaintiffs-appellees Richard Leander Ferebee, Jr., Evelyn Ferebee Murphy, representatives of the estate of Richard Leander Ferebee; Eric A. Ferebee and Sirene L. Ferebee, by their mother and next friend, Shirley Ferebee; Rita Cassandra Elliott, by her mother and next friend, Retha Elliott; and defendant-appellant Chevron Chemical Company.

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* Chevron Chemical Company is a wholly-owned subsidiary of Chevron Corporation (formerly Standard Oil Company of California). Partially owned subsidiaries and affiliates of Chevron Corporation are: Huntington Beach Company, Kenai Pipe Line Company, Plantation Pipe Line Company, Amax, Inc., Irving Oil Limited, American Overseas Petroleum Limited, Caltex Petroleum Companies, P.T. Caltex Pacific Indonesia and Arabian American Oil Company.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Chevron Chemical Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals is reported at 736 F.2d 1529 and appears in the Appendix at 1a. The opinion of the district court denying Chevron's motion for judgment notwithstanding the verdict is reported at 552 F. Supp. 1293 and appears in the Appendix at 27a.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1984. [Appendix ("App.") at 51a.] A timely

petition for rehearing and suggestion for rehearing *en banc* were denied (with Circuit Judges Wilkey, Bork and Scalia voting in favor of rehearing) on August 14, 1984. [App. at 52a, 53a.] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Article VI, Clause 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Federal Insecticide, Fungicide, and Rodenticide Act, Pub. L. 92-15, 86 Stat. 873, as amended ("FIFRA") § 24(b), 7 U.S.C. § 136v(b) (1976 and Supp. V 1981):

> Such state shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

STATEMENT OF THE CASE

"Paraquat is an important agricultural herbicide." [App. 2a.] Since 1966, when paraquat was first registered by the federal government for use in this country, over a million people have used it. Its value in reducing soil erosion, energy consumption and water loss and in adding acres to the nation's farmland has been demonstrated conclusively. [Record Entry No. ("R.E.") 139-V at 1270-75.]

The sale of paraquat is extensively regulated by the Environmental Protection Agency ("EPA") under the Federal Insecticide, Fungicide, and Rodenticide Act, Pub. L. 92-15, 86 Stat. 873, as amended ("FIFRA"), 7 U.S.C. §§ 136 et seq. (1976 and Supp. V 1981).

Since the early 1960's, literally hundreds of scientific studies have been conducted and submitted to EPA in connection with its regulation of paraquat. [R.E. 190-G at 1672-73.] After exhaustive testing and review of voluminous scientific evidence and studies, including its own independent testing, EPA has determined that the label on paraquat—with "POISON," "DANGER" and "Skull and Cross-Bones" warnings all over it—is "likely to be read and understood by the ordinary individual under customary conditions of purchase and use." EPA has also determined that, as labeled, "when used in accordance with widespread and commonly recognized practice," paraquat "will not generally cause" "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits" of its use. FIFRA §§ 2(q)(E), 2(bb), 3(c)(5)(D), 7 U.S.C. §§ 136(q)(1)(E), 136(bb), 136a(c)(5)(D).

These determinations were recently reaffirmed after a thorough, four-year "intensive scientific review." Based upon a "comprehensive scientific review of all available paraquat health effects and environmental effects data," on October 13, 1982 EPA stressed that "[a]vailable data indicate that [paraquat does] not present risks of unreasonable adverse effects to man or the environment." 43 Fed. Reg. 30613 (July 17, 1978); 47 Fed. Reg. 45075 (October 13, 1982).

EPA did not merely passively approve the label proposed by Chevron. When Chevron submitted its draft label, EPA required that it be modified. [R.E. 139-V at 1290-92; defendant's exhibit ("DX") 17.] In the sixteen years that it has been used in the United States, no one has ever experienced serious illness or death from agricultural use of paraquat. [R.E. 190-G at 1681-82.]

Everything about paraquat's packaging and labeling is designed to call the user's attention to the fact that it is

poison and to tell him or her to use it strictly according to the clear directions on the label. Paraquat is packaged in cardboard boxes, each holding four smaller cardboard cartons, with a one-gallon plastic bottle in each carton. To use paraquat, you have to read "POISON" fourteen times, "DANGER" nine times, and see twelve "Skull and Cross-Bones" warnings. The distinctive red top tells you in plain language (English as well as Spanish) to "READ LABEL" and its conspicuous purple-striped label states in bold-face type:

> USE STRICTLY IN ACCORDANCE WITH DANGER STATEMENTS AND DIRECTIONS, AND WITH APPLICABLE STATE AND FEDERAL REGULATIONS.

Under the bold-face heading "WORKER SAFETY RULES," the label warns a user to,

> WASH SPLASHES from skin and eyes immediately.
> REMOVE and wash contaminated clothing.
> WASH before eating, smoking and drinking.

It tells a user to wear waterproof clothing if there is a risk of spray exposure and, after telling him or her to "READ FIRST AID AND SAFETY RULES ON SIDE PANELS," warns:

> SKIN CONTAMINATION
>
> In case of skin contact, wash immediately with water. Remove clothing and wash skin where necessary. Prolonged contact will cause severe irritation. Repeated contact may increase danger of absorption.

Richard L. Ferebee was an agricultural research technician at the Beltsville Agricultural Research Center ("BARC") of the U.S. Department of Agriculture. He was responsible for a broad range of specialized research assignments and had extensive experience in weighing out and mixing the chemicals used for control and spraying of plants. [DX-32.]

BEST AVAILABLE COPY

In 1973 and 1974—long before he ever sprayed paraquat—he began experiencing shortness of breath on moderate exertion. This gradually worsened so that, around the end of October 1979, he had difficulty walking a block on a level surface. [DX-36; DX-37.]

In 1977, Ferebee first began spraying paraquat. On two occasions, he accidently exposed himself to small amounts of dilute paraquat spray. He sprayed sporadically during the summer of 1977, once or twice in the summer of 1978 and off and on from June until August of 1979. Both before and during his brief periods of spraying paraquat, Ferebee used a number of other agricultural chemicals. When he used them he wore protective clothing, including boots, rubber pants, raincoats, hat, gloves and goggles—all equipment that was available to him at BARC. [R.E. 77A-B at 27-34, 37-38, 149, 62, 16-17, 63, 97, 104, 163-65, 170-73, 181-83.]

Ferebee knew that all chemicals—including paraquat—were dangerous. [R.E. 77A-B at 100.] He had seen a safety movie emphasizing the need to wear protective clothing when spraying and he had expressly been told to wear protective clothing. He noticed that almost all of the chemicals he used had a poison label. Despite this knowledge, he never bothered to read either the label or the accompanying supplemental pamphlet for paraquat. [*Id.* at 99-100, 107-109, 150, 153-55.]

Ferebee and, when he died, his estate and survivors brought this diversity action against Chevron claiming that his exposure to dilute paraquat spray caused his pulmonary disease. Plaintiffs' expert admitted that this was the first case of alleged chronic disease from paraquat, that it "obviously is a rare case since it is the first one" and that it would be speculation to assume that someone else might have the same "disease." [R.E. 190-B, 190-C at 613-14, 642-43.] The sole claim of liability was that the label inadequately warned of the danger

of skin exposure to paraquat. Plaintiffs offered no evidence that the label approved by EPA was "inadequate" or that it failed to warn a normal user of its dangers or how to use it properly.

The case was tried twice. After deliberating for two and a half days, the first jury deadlocked and the district court declared a mistrial. The case was retried from October 19 to November 4, 1982, with the second jury returning a verdict of $60,000 for Mr. Ferebee's minor children only on their wrongful death claim. The jury awarded nothing to Mr. Ferebee's estate.

The district court, although denying Chevron's motion for judgment notwithstanding the verdict, stated that it had "some difficulty in agreeing that a rational jury could have found either that Mr. Ferebee read the label or that the label was not adequately designed to attract attention." [App. at 45a.] Chevron appealed to the D.C. Circuit, which affirmed. [App. at 1a.]

Despite Congress's explicit statement that § 24(b) of FIFRA "preempts any State labeling or packaging requirements differing from such requirements under the Act,"[1] the D.C. Circuit concluded that, "[w]hile FIFRA does not allow states *directly* to impose additional labelling requirements," states could nevertheless "control" the sale of paraquat by "holding Chevron liable [in a tort action] for injuries that could have been prevented by a more adequate label." [App. at 21a-22a (emphasis added).]

In the court of appeals' reasoning,

> Maryland can be conceived of having decided that, if it must abide by EPA's determination that a label

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[1] S. Rep. No. 92-838, 92d Cong., 2d Sess. (June 7, 1972), reprinted in 1972 U.S. Code Cong. & Admin. News 3993, 4021; *see also* S. Rep. No. 92-970, 92d Cong., 2d Sess. (July 19, 1972), reprinted in 1972 U.S. Code Cong. & Admin. News 4092, 4128 (same language).

> is adequate, Maryland will nonetheless require manufacturers to bear the risk of any injuries that could have been prevented had Maryland been allowed to require a more detailed label or had Chevron persuaded EPA that a more comprehensive label was needed. . . . That may in some sense impose a burden on the sale of paraquat in Maryland, but it is not equivalent to a *direct* regulatory command that Chevron change its label.

[App. at 21a (emphasis added).]

Under Maryland law, Chevron was entitled to presume that Mr. Ferebee would read the label and follow its directions. In a radical departure from the mainstream of Maryland law, the D.C. Circuit, however, opined—without citing any authority—that "[w]e believe Maryland *would construe* its tort law in this case to require only that *someone* in the workplace have read the label, not that Mr. Ferebee personally have read it." [App. at 17a (emphasis added).]

The court of appeals also ignored the consistent line of Maryland (as well as District of Columbia) case law holding that a seller is not liable for injuries to a supposedly "hyper-susceptible" individual, particularly where plaintiffs' own evidence demonstrates that it would be rank speculation to say that there were others with the same "unique" disease. Finally, the D.C. Circuit completely disregarded the consistent line of cases holding that it is improper to impose liability where a defendant complies with prevailing industry standards, and the plaintiff fails to offer any evidence that the product was not reasonably safe for its intended use.

REASONS FOR GRANTING THE WRIT

I. THE D.C. CIRCUIT'S DECISION (1) NULLIFIES CONGRESS'S INTENTION TO HAVE EPA MAKE ALL DETERMINATIONS ABOUT A PESTICIDE'S LABEL, (2) WREAKS HAVOC WITH THE REGULATORY SCHEME OF FIFRA, AND (3) SUBJECTS MANUFACTURERS TO CONFLICTING "REGULATION" BASED ON WHAT A LAY STATE JURY MAY HAPPEN TO DECIDE IN ANY GIVEN CASE

The Court of Appeals' decision eviscerates Congress's plainly expressed intention to have EPA make all determinations about a pesticide's label, wreaks havoc with the regulatory scheme Congress carefully worked out in FIFRA, and subjects pesticide manufacturers to shifting and conflicting demands based on what a lay state jury may decide in any given case.

This past term, the Court reaffirmed that *all* contrary state regulation must yield where "Congress, in enacting a federal statute, has expressed a clear intent to preempt state law, *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)." *Capital Cities Cable, Inc. v. Crisp*, —— U.S. —— (decided June 18, 1984), Slip Opinion at 6-7.

Apart from the plain language of § 24(b)—a state "shall not impose or continue in effect any requirements for labeling . . . in addition to or different from those required under this subchapter"—its legislative history confirms that Congress intended the labeling requirements imposed by EPA under FIFRA to be the exclusive standard and to preempt state law:

> Subsection (b) preempts any State labeling or packaging requirements differing from such requirements under the Act.

S. Rep. No. 92-838, *see* note 1 above. The House Committee Report also makes it plain that the states are without any power to regulate—directly or, as the D.C. Circuit held, "indirectly"—the labeling of pesticides:

DANGER
CAN KILL IF SWALLOWED
HARMFUL TO THE EYES AND SKIN

FIRST AID TREATMENT

IF SWALLOWED
Immediately induce vomiting by inserting finger in throat. Administer fluids and induce further vomiting. Get to a hospital or physician fast.
PROMPT TREATMENT IS ESSENTIAL. Symptoms of injury may be delayed.

SKIN CONTAMINATION
In case of contact, wash immediately with water. Remove clothing and wash skin where necessary. Prolonged contact will cause severe irritation. Repeated contact may increase danger of absorption.

EYE CONTAMINATION
In case of contact, wash thoroughly with water and get medical attention.

INHALATION
Do not breathe spray mist.
Exposure to spray mist may cause irritation and nose bleeds. Stop and check spray procedure.

Note to Physicians: Emergency Information—call (415) 233-3737.

CONDITIONS OF SALE: 1. Chevron Chemical Company (Chevron) warrants that this material conforms to the chemical description on the label and is reasonably fit for use as directed hereon. Chevron neither makes, nor authorizes any agent or representative to make, any other warranty of FITNESS or of MERCHANTABILITY, guarantee or representation, express or implied, concerning this material.
2. Critical and unforeseeable factors beyond Chevron's control prevent it from eliminating all risks in connection with the use of chemicals. Such risks include, but are not limited to, damage to plants and crops to which the material is applied, lack of complete control, and damage caused by drift to other plants or crops. Such risks occur even though the product is reasonably fit for the uses stated hereon and even though label directions are followed. Buyer and user acknowledge and assume all risks and liability (except those assumed by Chevron under 1 above) resulting from handling, storage or use of this material.

BEST AVAILABLE COPY

POISON
DO NOT REMOVE CONTENTS
EXCEPT FOR IMMEDIATE USE.
ONE SWALLOW CAN KILL!

RESTRICTED USE PESTICIDE
For retail sale to and use only by Certified Applicators or persons under their direct supervision and only for those uses covered by the Certified Applicator's certification.

Chevron

ORTHO PARAQUAT CL

A Weed and Grass Killer · Harvest Aid Chemical
NEVER PUT INTO FOOD, DRINK OR OTHER CONTAINERS

DANGER CAN KILL IF SWALLOWED
KEEP OUT OF REACH OF CHILDREN
DO NOT USE OR STORE IN OR AROUND THE HOME

	By Wt
Active Ingredient	
Paraquat dichloride (1,1'-dimethyl-4,4'-bipyridinium dichloride)	29.1%
Inert Ingredients	70.9%
Contains 2 lbs. Paraquat cation per gallon	

READ FIRST AID AND SAFETY RULES ON SIDE PANELS

DIRECTIONS FOR USE

It is a violation of Federal law to use this product in a manner inconsistent with its labeling.

READ ENTIRE LABEL. USE STRICTLY IN ACCORDANCE WITH DANGER STATEMENTS AND DIRECTIONS, AND WITH APPLICABLE STATE AND FEDERAL REGULATIONS.

NOTE: Do Not Use Around Home Gardens, Schools, Recreational Parks or Playgrounds.

Refer to Supplemental Pamphlet for Use Directions.

WORKER SAFETY RULES

Avoid accidents. Follow these pesticide Safety rules when handling this product.

WASH SPLASHES from skin and eyes immediately.

REMOVE and wash contaminated clothing.

WASH before eating, smoking and drinking.

CONCENTRATE/MIXING

Wear full face shield, rubber gloves and apron when handling concentrate.

SPRAY APPLICATION

Avoid working in spray mist. If there is risk of exposure wear goggles and approved face mask capable of filtering spray droplets.

Wear waterproof footwear and clothing when spraying or when contacting vegetation wet with spray.

Chevron Chemical Company

Ortho Agricultural Chemicals Division

San Francisco CA 94120-7144 Richmond CA 94804-0036

R Form 8525 R Product 1000 22

EPA Reg. No. 239-2185-22 [illegible] 239 MU-1

ENVIRONMENTAL SAFETY CAUTIONS

WILDLIFE

This product is toxic to wildlife. Birds and other wildlife in treated areas may be killed. Do not apply directly to water.

DRIFT

ORTHO Paraquat CL is a contact herbicide that kills all green plant tissue. Do not apply under conditions involving possible drift to food, forage or other plantings that might be damaged or the crops thereof rendered unfit for sale, use or consumption. Do not apply when weather conditions favor drift from areas treated.

CHEMICAL HAZARD

This product reacts with aluminum to produce hydrogen gas which may form a highly combustible gas mixture. Such gas could flash or explode, causing serious personal injury, if ignited by open flame, spark, welder's torch, lighted cigarette or other ignition source. Do not mix or store in containers, spray tanks, nurse tanks or such systems made of aluminum or having aluminum fittings. After dilution with water to spray concentrations, spray systems made of, or containing aluminum parts, may be used but should not be used for extended (overnight) storage.

EQUIPMENT/CONTAINERS

Flush all spray equipment with water after use each day. ORTHO Paraquat CL is corrosive to aluminum. Aluminum spray equipment and aluminum aircraft structures that are exposed to spray solution or spray drift should be flushed thoroughly with water immediately after use.
WASH and destroy containers when empty – Never reuse.
DO NOT contaminate water when cleaning equipment or disposing of wastes.

STORE AT TEMPERATURES ABOVE 32° F.

Do not contaminate feed, foodstuffs or drinking water.

> In dividing the responsibility between the States and the Federal Government for the management of an effective pesticide program, the Committee has adopted language which is intended to *completely preempt State authority* in regard to labeling and packaging. With regard to this Federal preemption of labeling and packaging, EPA may, where appropriate, in setting labeling and packaging requirements, give consideration to regional, State, and local needs.

H.R. Rep. No. 92-511, 92d Cong., 2d Sess. 16 (September 25, 1971) (emphasis added); *see* remarks of Senator Allen, 118 Cong. Rec. 32257 (Sept. 26, 1972) (EPA is given "practically plenary power to assure that every pesticide in the country is properly labeled with adequate cautions and directions"). Congress has now "occupied the field" of pesticide labeling. *Cf. City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973).

The Court also pointed out last term that the 1972 amendments to FIFRA—which include § 24(b)'s preemption of labeling—made FIFRA a "comprehensive regulatory statute," encompassing the "use, as well as the sale and labelling, of pesticides." *Ruckelshaus v. Monsanto Corp.*, —— U.S. —— (decided June 26, 1984), Slip Opinion at 3; *see* remarks of Congressman Latta, 117 Cong. Rec. 39975 (Nov. 8, 1971) ("a comprehensive regulatory statute").

In the 1972 amendments Congress intended to foster the "invaluable contribution" that safe, effective pesticides have made to the nation's well-being. By controlling plant diseases and insects, pesticides have increased agricultural production enormously and have given the American consumer progressively less expensive agricultural produce. They have "saved millions of lives as a result of their widespread use to control or eradicate pest carried diseases." H.R. Rep. No. 92-511, *supra*, at 5-7. The 1972 amendments were intended to balance

pesticide safety with the necessity of having effective pesticides available to meet the nation's needs. Remarks of Congressman Poage, 117 Cong. Rec. 39977 (Nov. 8, 1971).[2]

There are compelling policy reasons, apart from the clear language of the statute, why it is impermissible to allow *ad hoc* state determinations—particularly by lay juries—as to whether a label is or is not "adequate." Congress has decided that EPA—a federal agency comprised of expert scientists—is to consider the available scientific data and other information and decide whether a given label is "likely to be read and understood by the ordinary individual under customary conditions of purchase and use" and if, so labeled, the directions and warning statements are "adequate to protect health and the environment." FIFRA §§ 2(q)(1)(E), (F) and (G), 3(c)(5)(B), (C) and (D), 7 U.S.C. §§ 136(q)(1)(E), (F) and (G), 136a(c)(5)(B), (C) and (D); *see Ruckelshaus v. Monsanto Co.*, Slip Opinion at 3.

The trial court, invoking state tort law, instructed the jury that they were to determine whether paraquat, as labeled, was "unreasonably dangerous," *i.e.*, whether the label warnings were "adequate." To make this determination, the jury was further instructed to consider "whether the warning would inform the ordinary user to protect himself from the danger" and "whether the warning on the container was in a form that would catch the attention of a reasonably prudent user."

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[2] Under the D.C. Circuit's holding, Chevron has the Hobson's choice of (a) subjecting itself to damage suits in Maryland for using the label required by EPA or (b) not selling paraquat in the state. [App. at 21a.] If Chevron opts for the latter, it will be Maryland's farmers who will suffer by being deprived of a valuable agricultural resource. [R.E. 140-B at 1634-38.] And Congress's intention in FIFRA to make effective herbicides and pesticides available nationwide will have been frustrated.

These decisions, however, are obviously the very same ones that Congress has said in FIFRA are to be made by EPA—and has specifically said are preempted from state regulation. As one lower court has stressed,

> when federal agencies have perceived a specific risk and have required labeling to alleviate that risk, . . . a state's freedom to require other than identical labeling with respect to that risk is precluded.

Cosmetic, Toiletry and Fragrance Ass'n v. Minnesota, 440 F. Supp. 1216, 1223 (D. Minn. 1977), *affirmed*, 575 F.2d 1256 (8th Cir. 1978). *See also Weinberger v. Bentex Pharmaceuticals, Inc.*, 412 U.S. 645, 652, 653-54 (1973) (Congress has decided that the agency—comprised of experts—shall decide technical and scientific issues; "[e]valuation of conflicting reports as to . . . drugs among experts in the field is not a matter well left to a court without chemical or medical background"); *Public Citizen Health Research Group v. Commissioner, FDA*, —— F.2d ——, No. 83-1302 (D.C. Cir., decided July 27, 1984), Slip Opinion at 13-14 ("such a determination necessarily involves subtle scientific judgments"); *Gray v. United States*, 445 F. Supp. 337, 340 (S.D. Tex. 1978) (Congress's choice of a federal agency to determine whether a substance is safe "must be beyond private scrutiny and litigation").

Under the D.C. Circuit's decision, Chevron is being subjected to liability for not having its warnings about the alleged "dermal hazard" of paraquat more conspicuous or explicit. Instead of saying "One Swallow Can Kill," the label supposedly should have said something like "One Swallow Can Kill and, If You Are Extremely Hyper-Sensitive, Paraquat On Your Skin Can Possibly Also Kill." Another jury, in another case, may then, according to the Court of Appeals, decide to the contrary and conclude that the "dermal hazard" was *too* conspicuously featured and detracted from the force of the warning against swallowing the product, which should have

been given greater prominence. *See Dawson v. Chrysler Corp.*, 630 F.2d 950, 963 (3d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981) (*ad hoc* lay jury determinations, with varying and inconsistent "standards," are unfair).

Clearly this is a question of judgment—and Congress has expressly stated that this judgment is to be exercised only by EPA—to avoid just this kind of uncertainty and haphazard inconsistency. Because of the utter lack of any scientific evidence that paraquat does what plaintiffs' "experts" claim it does—and literally hundreds of tests and studies that it does not—EPA has decided that the label on the product, which does tell the user of its realistic dangers and how to avoid them, is the appropriate one, with proper warnings based upon scientific evidence and years of safe use.

The D.C. Circuit's decision flies in the teeth of *San Diego Unions v. Garmon*, 359 U.S. 236, 246-47 (1959), where the Court directly rejected the court of appeals' rationale in this case—*i.e.*, that a state may "indirectly" regulate through its tort system where Congress has otherwise preempted the field:

> Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventative relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. . . . To sanction either [a damages award or injunction] involves a conflict with federal policy in that it involves allowing two law-making sources to govern.

In *Garmon* the Court held that state tort remedies would not be permitted to interfere with activities that were "potentially subject to the exclusive federal regulatory scheme." 359 U.S. at 247. The labeling of paraquat and other pesticides is not merely "potentially" subject to

exclusive federal regulation. It is expressly and explicitly delegated to EPA, and EPA alone, to decide. *See also Farmers Union v. WDAY, Inc.*, 360 U.S. 525, 535 (1959) (any attempt by a state to regulate matters preempted by federal law, including a state law tort action for libel, is impermissible); *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1153 (9th Cir. 1983) (compliance with exclusive federal requirements fulfilled a defendant's duty of care as a matter of law, rejecting a claim that a federally-approved headlight was "inadequate").

This case squarely presents the important question left unanswered by a narrowly divided Court in *Silkwood v. Kerr-McGee Corp.*, —— U.S. —— (decided January 11, 1984)—*i.e.*, the circumstances in which "federal law would preempt the recovery of damages based on state law." Slip Opinion at 17. In contrast with *Silkwood*—where the legislative history of the nuclear legislation involved in the case, as well as subsequent legislation, expressly contemplated that state tort remedies would remain, Slip Opinion at 11-17—§ 24(b) of FIFRA and its legislative history demonstrate that Congress intended to preempt any state regulation in pesticide labeling.[3]

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[3] In *Silkwood*, Kerr-McGee apparently failed to comply with NRC regulations. Slip Opinion of Powell, J., at 3-5. Here the evidence is undisputed that Chevron complied completely with EPA's labeling requirements. The issue in *Silkwood* was whether the general nature of federal regulation of nuclear energy barred an award of punitive damages in a state law tort action. In the present case, there has been an explicit determination by EPA that paraquat, as labeled, will pose no unreasonable adverse risks and that the label will be read and followed.

Such cases as *Burch v. Amsterdam Corp.*, 366 A.2d 1079 (D.C. App. 1979), cited by the D.C. Circuit [App. at 23a], are utterly irrelevant. *Burch* merely held that compliance with the *minimum* labeling requirements of the Federal Hazardous Substances Act would not preclude a finding of negligence as a matter of law; that Act, however, contains none of the preemptive provisions found in § 24(b) of FIFRA.

The D.C. Circuit's opinion also directly conflicts with *Jones v. Rath Packing Co.*, 430 U.S. 519, 530-31 (1977), where the Court held that a virtually identical provision to § 24(b) of FIFRA in the Federal Meat Inspection Act ("FMIA"), as amended, 81 Stat. 854, 21 U.S.C. §§ 601 *et seq.*—prohibiting "[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under" that act, FMIA § 408, 21 U.S. § 678—was an "explicit pre-emption provision."

The incongruity of the D.C. Circuit's decision is particularly stark when its rationales are juxtaposed. Despite the lack of any medical or scientific evidence that paraquat can cause the kind of chronic disease Mr. Ferebee had—and a host of evidence gathered over years of safe use that it does not—the court of appeals refused to set aside the verdict because plaintiffs' two experts opined to the contrary. The court viewed this as a "classic battle of experts," stating that "[i]n a courtroom . . . the fact that . . . science would require more evidence before conclusively considering the causation question resolved is irrelevant." [App. at 9a, 10a.]

At the same time, however, the court of appeals acknowledged that "[j]udges, both trial and appellate, have no special competence to resolve the complex and refractory causal issues raised by the attempt to link low-level exposure to toxic chemicals with human disease"—characterizing the matter as "at the frontier of current medical and epidemiological inquiry." [App. at 8a.]

A lay jury is certainly no better equipped than judges to evaluate such scientific issues. *Weinberger v. Bentex Pharmaceuticals, Inc.*, 412 U.S. at 653-54 ("Evaluation of conflicting reports as to . . . drugs among experts in the field is not a matter well left to a court without chemical or scientific background"). This is precisely why Congress has said that EPA, with a staff of trained scientific experts, is the proper—and only—entity to decide these matters under FIFRA.

As the D.C. Circuit also recognized, EPA approved the paraquat label "[a]fter extensive scientific testimony" on these issues. [App. at 18a.] Against this background, its holding that "a state (acting through its jurors)" [App. at 19a] may reassess the same matters is particularly anomalous—for at least three separate reasons.

First, EPA has, but courts (and *a fortiori* lay jurors) do not have, "special competence" to resolve complex scientific questions. Second, there is nothing in the record—not a whit—to indicate that either Congress or the State of Maryland actually intended to allow a lay jury to second-guess EPA's decision by reweighing "the elements which go into determining whether a substance as labelled is of sufficient net benefit as to warrant its use." [App. at 19a.] To the contrary, § 24(b) and its legislative history, not to mention FIFRA as a whole, make it clear that Congress intended EPA alone to make this decision where labeling is concerned. Third, the jury through which Maryland "can be conceived of having decided" [App. at 21a] to regulate paraquat was composed entirely of District of Columbia jurors sitting in a federal court in the District of Columbia.

Simply stated, this does not make sense and there is no authority for the premise of the D.C. Circuit's decision—that a state may "indirectly" regulate the label on a pesticide through its tort laws, although it is expressly prohibited by federal law from regulating pesticide labeling in any fashion. The teaching of *San Diego Unions v. Garmon*, 359 U.S. at 246-47, is directly to the contrary.

On these grounds alone, the petition for writ of certiorari should be granted to decide this substantial issue at the heart of Congress's comprehensive scheme to have one entity—EPA—regulate pesticide labeling uniformly throughout the United States.

II. THE COURT OF APPEALS' DECISION IGNORES *ERIE R.R. v. TOMPKINS*. IF NOVEL PROPOSITIONS OF STATE LAW ARE TO BE APPLIED, THE MARYLAND COURT OF APPEALS SHOULD DECIDE THEM

Maryland supplies the rule of decision on state law issues in the case. [App. at 5a.] In three separate instances, the D.C. Circuit either ignored established Maryland law—and adopted without any substantive analysis, much less any legal authority, a contrary view—or utterly disregarded the controlling legal precedent.

First, the overwhelming line of authority, including Maryland law, is that a user's failure to read the label absolves the manufacturer of liability. Mr. Ferebee did not read the label on the paraquat he used. [App. at 16a.]

A glance at the label—with prominent "DANGER," "POISON" and other warnings on a purple-striped background—demonstrates that, had Mr. Ferebee read the label and followed its plainly-worded directions, it would have been impossible for him to have been exposed to *any* paraquat. In *Phipps v. General Motors Corp.*, 278 Md. 337, 363 A.2d 955, 960 (1976), the Court of Appeals of Maryland stressed that "the seller is not liable . . . if warnings or instructions supplied with the product are disregarded by the consumer where, if used in accordance with those warnings, the product would be safe," citing Restatement (Second) of Torts § 402A, comment j (1976) ("where a warning is given, the seller may reasonably assume it will be read and heeded").[4]

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[4] *See also Levin v. Walter Kidde & Co., Inc.*, 251 Md. 560, 248 A.2d 151, 154 (1968) (the words "Never use cracked bottle" "as a matter of law constituted sufficient warning" to a reasonable user and plaintiff's failure to follow the directions barred recovery; di-

In contrast, the D.C. Circuit stated—without reference to a single decision, from Maryland or elsewhere—that "[w]e believe Maryland would construe its tort law in this case to require only that *someone* in the workplace have read the label, not that Mr. Ferebee personally have read it." [App. at 17a (emphasis in the original).] Based on this "prediction," the court of appeals then went on to posit that the jury "*could* properly have *inferred*" that, had a different label been used, someone would have communicated its contents to Mr. Ferebee or that his employers would have somehow done something differently. [*Id.* (emphasis added).] [5]

Under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), the D.C. Circuit was required to apply the law of Maryland as enunciated by the Court of Appeals of Maryland. There is no indication, and certainly nothing in the D.C. Circuit's decision, that Maryland's Court of Appeals would adopt the novel approach that it does not matter whether the user of a pesticide bothers to read the label,

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rected verdict affirmed). *Cf. Johnson v. Niagra Machines & Tool Works*, 666 F.2d 1223 (8th Cir. 1981) (affirming directed verdict where the plaintiff's testimony established he had not read the warning); *Chambers v. G.D. Searle & Co.*, 441 F. Supp. 377 (D.Md. 1975), *affirmed*, 567 F.2d 269 (4th Cir. 1977).

[5] The only testimony at trial by someone who used paraquat—and did read the label—established that he did so to protect himself and know what he was spraying, and that he followed the directions. *See National Organization for the Reform of Marijuana Laws v. United States Drug Enforcement Administration*, 545 F. Supp. 981, 986 (D.D.C. 1982):

> Paraquat is a registered herbicide in wide use throughout the United States. There is no evidence that the spraying of marijuana will affect man . . . any differently than do other, relatively commonplace, herbicidal eradication programs. Similarly, this Court has no reason to doubt that the Florida law enforcement personnel will use paraquat other than in accordance with the label restrictions, thereby minimizing any danger to themselves.

so long as "someone" reads it. Even disregarding the cases that the failure to read and follow the label's directions bars recovery, if a change is to be made in Maryland law (not to mention one that is without precedent anywhere else), it should be made by the Court of Appeals of Maryland.

Maryland has a certification statute, § 12-601, Courts and Judicial Procedure, Md. Code Annot. (1974). This Court has made it plain that, where a novel issue is presented and the state whose law provides the rule of decision has a certification procedure, this is the course to follow. *Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974) ("Here resort to it would seem particularly appropriate in view of the novelty of the question"). Certification in the long run saves "time, energy, and resources and helps build a cooperative judicial federalism." *Id. See also Elkins v. Moreno*, 435 U.S. 647 (1978) (certifying question to Court of Appeals of Maryland); *Bellotti v. Baird*, 428 U.S. 132, 150-51 (1976) (directing certification).[6]

The D.C. Circuit failed to certify two other issues of state law and as a result made serious errors in construing that law. First, under Maryland law Chevron cannot be liable for injuries to someone who is not only the first supposed "case" of "chronic," *i.e.*, long term, continuing paraquat "disease," but, if a "case" at all, is an extremely hyper-sensitive individual:

> [T]here is generally no liability upon a seller where the buyer [user] has been unusually susceptible to injury from the product. A manufacturer cannot be required . . . to insure against the susceptibility of a particular individual. Its duty is to guard against probabilities, not possibilities.

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[6] Chevron consistently requested that the D.C. Circuit certify the issues to the Court of Appeals of Maryland if it had any doubt as to Maryland law. [Chevron brief at 55 n.32; Chevron reply brief at 29 n.21.]

Chambers v. G.D. Searle & Co., Inc., 441 F. Supp. 377, 380 (D. Md. 1975), *affirmed*, 567 F.2d 269 (4th Cir. 1977) (applying Maryland law). The court of appeals ignored this principle, not to mention the plaintiffs' own expert's testimony that Mr. Ferebee was a very rare case (the first in sixteen years of use by over a million people), that he was hyper-susceptible, and that it would be speculation to assume that there were others like him. [R.E. 190-B, 190-C at 613-14, 642-43.] Instead, the D.C. Circuit surmised—again without any authority—that "[i]f paraquat caused Mr. Ferebee's illness, . . . there is nothing to suggest that another individual in Ferebee's position would not also have been likely to contract the disease." [App. at 14a.] But plaintiff's own testimony established just the contrary—and that it would be rank speculation to say that there were others with the same "disease." Verdicts cannot be based on speculation. *Business Development Corp. of North Carolina v. United States*, 428 F.2d 451, 453 (4th Cir.), *cert. denied*, 400 U.S. 957 (1970).[7]

Second, where the evidence establishes compliance with prevailing industry standards, and the plaintiff fails to offer any evidence that the product was not reasonably safe for its intended use, judgment for defendant is required. *District of Columbia v. Freeman*, 477 A.2d 713, 719-20 (D.C. App. 1984) (expert testimony required to establish that condition of intersection was unreasonably

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[7] The evidence demonstrated that (1) Mr. Ferebee could not possibly have been exposed to enough dilute paraquat spray over his entire lifetime to cause him any injury [R.E. 190-E at 1092-98, 1158-63] and (2) all of his symptoms pointed to a relatively common disease, wholly unrelated to paraquat, known as "idiopathic [*i.e.*, cause unknown] pulmonary fibrosis" [R.E. 190-E at 1064, 1088-90; R.E. 190-G at 1540-41]. There is also no scientific evidence—and a host of scientific studies and data to the contrary—that paraquat can have a continuing, progressive effect long after exposure to the substance has ceased. [R.E. 190-E at 1181-82; R.E. 190-B at 366, 613.]

dangerous; since none was introduced, "[t]his theory of liability should not have been sent to the jury"; judgment reversed); *Sledd v. Washington Metropolitan Area Transit Authority*, 439 A.2d 464, 469 (D.C. App. 1981) (summary judgment affirmed where design criteria used by defendant conformed to prevailing industry standards and there was no evidence to show that the product was not reasonably safe for its intended use). The court of appeals also totally ignored these established cases and the principles underlying them.

Here, there have been sixteen years of safe use of paraquat in the United States using the label required by FIFRA—not to mention an exhaustive four-year review by EPA of all available data on the product. Given (i) plaintiffs' utter failure to adduce any evidence that, as labeled, paraquat is not safe for its intended use and (ii) the pervasive nature of federal regulation of the labeling of paraquat—a far more rigorous test than mere "industry standards"—the question of what Maryland "could decide" or "can be conceived of having decided" [App. at 21a] about the desirability of "regulating" pesticide labeling "indirectly" through the use of *ad hoc* lay juries is properly left to Maryland. If, to use the D.C. Circuit's language, Maryland is going to "control the use of paraquat for compensatory aims" by subjecting Chevron to state tort liability for an allegedly inadequate label [App. at 22a], this is a matter for the Court of Appeals of Maryland (or the state's legislature) to pass upon.

This case starkly presents the overriding issue—essential to the continued vitality of the federalism required by *Erie R.R. v. Tompkins*—of when a federal court should certify novel state law questions to a state appellate court for decision.

CONCLUSION

A writ of certiorari should issue to review the judgment of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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September 27, 1984

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1106

RICHARD LEANDER FEREBEE, JR., *et al.*

v.

CHEVRON CHEMICAL COMPANY,
Appellant

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 81-01129)

Argued October 31, 1983

Decided June 12, 1984

Loren Kieve, with whom *Laidler B. Mackall* was on the brief, for appellant.

Robert Case Liotta, with whom *Nathan I. Finkelstein* and *Diana J. Simon* were on the brief, for appellee.

Before: WALD and MIKVA, *Circuit Judges*, and BAZELON, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* MIKVA.

MIKVA, *Circuit Judge*: This is an appeal by Chevron Chemical Company from a judgment rendered against it after a jury trial in a suit brought by the minor

children and the estate of Richard Ferebee. Ferebee, an agricultural worker at the Beltsville Agricultural Research Center (BARC), an installation of the United States Department of Agriculture located in Beltsville, Maryland, allegedly contracted pulmonary fibrosis as a result of long-term skin exposure to dilute solutions of paraquat, a herbicide distributed in the United States solely by Chevron. When Ferebee died before trial, his estate continued with a survival action and a wrongful death count was added on behalf of his minor children. After a first trial ended in a mistrial, a second jury returned a verdict on the wrongful death count for $60,000 against Chevron. That verdict was based on the theory that Chevron's failure to label paraquat in a manner which adequately warned that long-term skin exposure to paraquat could cause serious lung disease made Chevron strictly liable for Ferebee's injuries.

After unsuccessfully moving for a directed verdict and a judgment notwithstanding the verdict, Chevron now asks this court to overturn the jury's verdict. Chevron's appeal offers a plethora of bases upon which it asserts that the jury's verdict was in error. Essentially, these claims divide into two groups, the first of which attacks the jury's verdict as inconsistent with the evidence and the second of which asserts that federal law precludes the tort action upon which Ferebee's children recovered. We find all of Chevron's claims to be without merit and affirm the district court's judgment upholding the jury verdict.

BACKGROUND

Paraquat is an important agricultural herbicide that has been sold in the United States since 1966. Paraquat is known to be toxic and to cause acute injury if directly absorbed into the body. For this reason, the sale and labelling of paraquat has been extensively regulated since 1966 by the federal government, first by the Department of Agriculture and currently by the Environmental Protection Agency (EPA).

At trial, the jury was presented with a complicated set of facts. In 1967 Richard Ferebee began work as an agricultural worker at BARC. His job frequently required him to spray various chemicals, including insecticides and herbicides, on greenhouse plants and, in the summer, on plants outside in the fields. Mr. Ferebee began spraying paraquat in the summer of 1977. He ordinarily sprayed six or seven times a month for between one and three hours. He used the product regularly during the outdoor growing seasons of 1977, 1978, and 1979.

When Mr. Ferebee sprayed paraquat in the fields, he frequently got the dilute spray on his skin, typically when he used his hands to shield plants while he sprayed weeds growing around them. In addition, in a videotape deposition taken before his death, Mr. Ferebee described two incidents of more extensive exposure to paraquat. The first occurred soon after he began spraying the compound. On that day, Ferebee spent several hours walking behind a tractor that was spraying paraquat. His head and bare arms became drenched with spray. At the end of the day, he began to feel dizzy and exhausted. When he went home, he was too tired to wash or change his clothes and fell asleep instantly. The dizziness and other symptoms did not persist, however, and he later returned to work.

Mr. Ferebee's second major exposure to paraquat also occurred during the 1977 growing season. On that occasion, he was spraying paraquat with a hand-held sprayer for some time when he noticed that the sprayer was defective and had leaked paraquat solution all over his pants. He stopped spraying and cleaned up as much as possible, but was not able to change his clothes until he went home.

Even before 1977, Mr. Ferebee was not a picture of perfect health. He was overweight, suffered from high blood pressure, and had a life-long sinus problem. Nonetheless, in late 1977, according to Mr. Ferebee's testi-

mony, he began to notice a marked change in his physical condition, most notably increasing shortness of breath. Over the next several years, Mr. Ferebee's condition progressively deteriorated. In November of 1979 he checked into Capital Hill Hospital, where Dr. Muhammad Yusuf, a pulmonary specialist, diagnosed Ferebee's disease as pulmonary fibrosis. Dr. Yusuf referred Mr. Ferebee to the National Institutes of Health, where he was treated during 1981 and 1982 by Dr. Ronald G. Crystal, Chief of the Pulmonary Branch of the Heart, Lung, and Blood Institute. After several consultations and tests, both Drs. Yusuf and Crystal concluded that Ferebee's pulmonary fibrosis was caused by paraquat poisoning. Mr. Ferebee's lung condition continued to degenerate, and on March 18, 1982 he died.

In the legal action prosecuted by Ferebee's estate and minor children, appellees presented both of Mr. Ferebee's treating physicians as expert witnesses. Both Dr. Yusuf and Dr. Crystal testified that, in their opinion, paraquat had caused Mr. Ferebee's pulmonary fibrosis. To support this view, they relied not only upon their own observation of Mr. Ferebee and the medical tests performed on him, but also upon medical studies which, they asserted, suggested that dermal absorption of paraquat can lead to chronic lung abnormalities of the sort characterized as pulmonary fibrosis. Appellees then argued to the jury that Chevron had not adequately labelled paraquat to warn against the possibility that chronic skin exposure could lead to lung disease and death and that this failure was a proximate cause of Mr. Ferebee's illness and death. Chevron appeals the jury's verdict which was necessarily based on acceptance of this theory.

ANALYSIS

We begin by determining the source and content of the cause of action upon which this suit is founded. Ferebee's exposure to paraquat occurred entirely at the

Beltsville Agricultural Research Center (BARC). BARC is located on federal land, over which the federal government exercises "exclusive Legislation," U.S. Const. art. I, § 8, cl. 17. Accordingly, any right of appellees to recover for their alleged injuries must initially find its source in either federal common law or federal statutory law. Since 1928, a federal statute has provided just such a right in an act which creates a cause of action for wrongful death occurring on federal property:

> In the case of the death of any person by the neglect or wrongful act of another within a national park or other place subject to the exclusive jurisdiction of the United States, within the exterior boundaries of any state, such right of action shall exist as though the place were under the jurisdiction of the State within whose exterior boundaries such place may be; and in any action brought to recover on account of injuries sustained in any such place the rights of the parties shall be governed by the laws of the State within the exterior boundaries of which it may be.

16 U.S.C. § 457 (1982)

The substantive elements of the cause of action created by the federal wrongful death act are thus defined by reference to state law. There is no dispute in this case that the relevant state law by which the federal cause of action must be defined is that of Maryland. There is a dispute, however, as to the content of that law. At the time of Ferebee's injury, Maryland law recognized a cause of action in strict products liability for failure to warn adequately of a product's inherently dangerous condition; it was according to this law that the jury was instructed. At the time BARC became federal property in 1938, in contrast, Maryland tort law recognized a cause of action only for negligence. Chevron argues that the federal statute incorporates only that state law which

was in effect at the time the federal government acquired the elevant property and that, given the state of Maryland law in 1938, it was error to allow plaintiffs, who had waived all claims sounding in negligence, to take their case to the jury on a theory of strict products liability.

We reject Chevron's view, which amounts to the position that Section 457 requires the wrongful death law on federal enclaves to be frozen at the date of cession. "The natural reading of the statutory language is that the wrongful-death law of a federal enclave should be identical to that of the surrounding state, whatever that law might be and however it might change over time." *Vasina v. Grumman Corp.*, 644 F.2d 112, 117 (2d Cir. 1981). In addition to the plain language of the statute, its history and logic belie the argument that Congress intended a static, rather than a dynamic, incorporation of state law. The federal act was passed in an effort to put tort victims on federal land on an equal footing with those injured just outside the boundaries of the federal enclave, *see* 69 CONG. REC. 1486 (1928) (statement of Senator Walsh); it is implausible to ascribe to a Congress so intended a contrary aim to saddle tort victims on federal land with the consequences of outdated legislation. We have no trouble agreeing with the numerous lower courts which have considered this question: Congress intended to allow the federal action to evolve concomitantly with changes in state law. *See, e.g., Mathis v. General Electric Corp.*, 580 F.2d 192, 194 (5th Cir. 1978) (implicitly interpreting § 457 to apply current state law); *Greene v. Vantage Steamship Corp.*, 466 F.2d 159, 166 n.9 (4th Cir. 1972) (same); *Muniz v. United States*, 280 F. Supp. 542, 546 (S.D.N.Y. 1968) (same). We hold that it is the state law in effect at the time of the injury that governs in suits brought under § 457.

Under that law as interpreted by the trial judge, appellees had the burden of proving, by a preponderance of the evidence, the following elements:

(1) That paraquat proximately caused Mr. Ferebee's illness and death;

(2) That paraquat is inherently dangerous;

(3) That Chevron knew, or should have known, at the time it sold the paraquat used by Mr. Ferebee, that the chemical was inherently dangerous;

(4) That the resulting duty to provide an adequate warning of the danger was not met;

(5) That the inadequacy of the warning proximately caused Mr. Ferebee's illness and death.

Chevron does not dispute that this is a correct statement of the elements necessary to recover under Maryland strict liability principles in a failure-to-warn suit. Nonetheless, Chevron seeks to overturn the jury's verdict on the theory that, with the exception of the second element, the jury could not reasonably have inferred from the conflicting testimony the existence of any of these elements. A review of the conflicting testimony with respect to each of these elements makes it clear that Chevron cannot sustain the heavy burden it must carry to overturn a jury's verdict. We also reject Chevron's legal claim that other federal law preempts this tort action.

I. The Jury Verdict

A. *Standard of Review*

An appellate court's function in reviewing the denial of a judgment notwithstanding the verdict is very limited. "The jury's verdict must stand unless 'the evidence, together with all inferences that can reasonably be drawn therefrom is so one-sided that reasonable men could not disagree on the verdict.'" *Carter v. Duncan-Huggins, Ltd.*, slip op. No. 82-1082 at 2 (D.C. Cir. Feb. 17, 1984) (cited cases omitted). The appellate court does not assess witness credibility nor weigh the evidence, but rather

seeks to verify only that fair-minded jurors could reach the verdict rendered. *Coburn v. Pan American World Airways, Inc.*, 711 F.2d 339, 342 (D.C. Cir. 1983). Chevron's burden on this appeal is thus "extremely heavy." *Boutros v. Riggs National Bank*, 655 F.2d 1257, 1260 (D.C. Cir. 1981).

These admonitions apply with special force in the context of the present action, in which an admittedly dangerous chemical is alleged through long-term exposure to have caused disease. Judges, both trial and appellate, have no special competence to resolve the complex and refractory causal issues raised by the attempt to link low-level exposure to toxic chemicals with human disease. On questions such as these, which stand at the frontier of current medical and epidemiological inquiry, if experts are willing to testify that such a link exists, it is for the jury to decide whether to credit such testimony. Against this background, we turn to Chevron's claims that appellees failed to establish the elements necessary to sustain a jury verdict in their favor.

B. *Causation*

Chevron first argues that the jury was obligated to reject appellee's theory that long-term exposure to paraquat caused Ferebee's illness and death. Chevron acknowledges that paraquat is known to be toxic, but argues that it is only acutely toxic—that is, that any injuries resulting from exposure to paraquat occur within a very short time of exposure, such as days or weeks, and that when exposure ceases, so too does the injury. In this case, Ferebee did not experience any of the symptoms of pulmonary fibrosis until late 1978, at which point it had been ten months since he last sprayed paraquat, and his chronic inflammatory lung disease continued to worsen long after his final use of paraquat in August of 1979. Plaintiffs' theory of recovery was thus that paraquat, when absorbed through the skin, can attack the

lungs in such a way as to cause chronic and self-perpetuating inflammation. Chevron argues that there has never been any evidence nor any suggestion that paraquat can cause chronic injury of this sort and that, in any event, Ferebee could not have been exposed to enough paraquat to injure him in this fashion.

The short answer to Chevron's argument is that two expert witnesses refuted it and that the jury was entitled to believe those experts. Both Drs. Crystal and Yusuf, who are eminent specialists in pulmonary medicine and who were Ferebee's treating physicians, testified that paraquat poisoning was the cause of Ferebee's illness and death. Both admitted that cases like Ferebee's were rare, but Dr. Crystal identified three other cases he felt were similar to that of Mr. Ferebee. Chevron argues that these cases can be distinguished from Mr. Ferebee's, but it is not our role to decide the merits of Chevron's attempted distinctions; Dr. Crystal thought the cases were similar, and the jury was entitled to believe him. Chevron of course introduced its own experts who were of the view that Ferebee's illness was not caused by paraquat, but the testimony of those witnesses, who did not treat Mr. Ferebee or examine him, can hardly be deemed so substantial that the jury had no choice but to accept it. The experts on both sides relied on essentially the same diagnostic methodology; they differed solely on the conclusions they drew from test results and other information. The case was thus a classic battle of the experts, a battle in which the jury must decide the victor. *Jenkins v. United States*, 307 F.2d 637, 646 (D.C. Cir. 1962).

Chevron seeks to avoid this conclusion by asserting that expert *opinion* testimony must be generally accepted in the scientific community before it can be introduced as evidence and that the views of Drs. Crystal and Yusuf, while not rejected by the medical community, are sufficiently novel *at this point* as to be inadmissible. As support for this proposition, Chevron cites the Maryland

Court of Appeal's statement in the criminal case of *Reed v. State*, 283 Md. 374, —— 391 A.2d 364, 368 (1978): "before a scientific opinion will be received as evidence at trial, the basis of that opinion must be shown to be generally accepted as reliable within the expert's particular scientific field." The court in *Reed*, however, was referring to the introduction of evidence based on novel scientific techniques or methodologies, *see id.* at 367-68, and carefully distinguished the test applied to such evidence from that involved in the admission of scientific opinion testimony that, while controversial in its conclusions, is based on well-founded methodologies. ("The question of the reliability of a scientific technique or process is unlike the question, for example, of the helpfulness of particular expert testimony to the trier of facts in a specific case."). *Id.* Thus, a cause-effect relationship need not be clearly established by animal or epidemiological studies before a doctor can testify that, in his opinion, such a relationship exists. As long as the basic methodology employed to reach such a conclusion is sound, such as use of tissue samples, standard tests, and patient examination, products liability law does not preclude recovery until a "statistically significant" number of people have been injured or until science has had the time and resources to complete sophisticated laboratory studies of the chemical. In a courtroom, the test for allowing a plaintiff to recover in a tort suit of this type is not scientific certainty but legal sufficiency; if reasonable jurors *could* conclude from the expert testimony that paraquat more likely than not caused Ferebee's injury, the fact that another jury might reach the opposite conclusion or that science would require more evidence before conclusively considering the causation question resolved is irrelevant. That Ferebee's case may have been the first of its exact type, or that his doctors may have been the first alert enough to recognize such a case, does not mean that the testimony of those doctors, who are

concededly well qualified in their fields, should not have been admitted.

Finally, Chevron argues that its expert, Dr. Fisher, proved that it was physically impossible for Ferebee to have been exposed to enough paraquat to cause him any injury. Dr. Fisher's testimony, however, went only to the amount of paraquat necessary to cause the short-term illnesses that have long been recognized to follow from paraquat exposure. Accepting Dr. Fisher's testimony as true, as plaintiffs did not at trial, it still would not necessarily follow that the same amount is needed to trigger a chronic case like that which Ferebee allegedly contracted. The jury could therefore have concluded that Ferebee had been exposed to sufficient amounts of paraquat to cause the chronic disease from which he suffered —even if that exposure was not substantial enough to produce acute symptoms. The dose-response relationship at low levels of exposure for admittedly toxic chemicals like paraquat is one of the most sharply contested questions currently being debated in the medical community, *see generally* Leape, *Quantitative Risk Assessment in Regulation of Environmental Carcinogens*, 4 HARVARD ENVT'L L. REV. 86, 100-103 (1980); surely it would be rash for a court to declare as a matter of law that, below a certain threshold level of exposure, dermal absorption of paraquat has no detrimental effect. We therefore conclude that there was sufficient evidence of causation to justify submission of that issue to the jury.

C. *Foreseeability and Duty to Warn*

Chevron next argues that, even if Ferebee's pulmonary fibrosis was caused by paraquat exposure, Chevron had no knowledge until this case that long-term dermal absorption of paraquat could induce pulmonary fibrosis; accordingly, Chevron claims, it cannot have been charged with a duty to warn against a danger that was not foreseeable at the time Ferebee was exposed to paraquat.

Chevron is correct that its duty to warn is limited to dangers that it knew or should have known about during the time Ferebee was exposed to paraquat. *See Chambers v. G.D. Searle & Co.*, 441 F. Supp. 377, 381 (D. Md. 1975), *aff'd*, 567 F.2d 269 (4th Cir. 1977). The conclusion which Chevron would have us draw from this principle, however, is not correct. The jury could have found that, as of July 1979, the last date on which Ferebee sprayed paraquat, Chevron's knowledge of the link between dermal paraquat exposure and lung disease was sufficient to require a more detailed label than that which the company provided.

In assessing Chevron's argument, it is necessary to consider the label which Chevron did provide. That label contains several warnings about the danger of skin exposure to paraquat. For example, the label in large bold letters states:

DANGER
CAN KILL IF SWALLOWED
HARMFUL TO THE EYES AND SKIN

The label also states that, in case of skin contact, the area exposed should be washed immediately and that contaminated clothing may have to be removed. The label further notes that "prolonged contact" will cause severe irritation and that "repeated contact" may increase the danger of absorption.

The label thus does inform the user that spilling paraquat on the skin may cause immediate and perhaps severe *skin* irritation. Yet nowhere does the label persuasively suggest that users whose skin comes into contact with the herbicide should be concerned about other possible consequences of skin exposure—particularly the specter of long-term lung disease culminating, perhaps, in death. (The label does note that repeated contact may increase the danger of absorption, but there is no hint of the dangers that may attend absorption). The jury certainly could have concluded that, absent a more specific warn-

ing about the relationship between skin exposure and lung disease, the average reader of the label who got paraquat onto his skin would presume that, once no immediate and acute injury occurred, the user was safe and need not take further precautions—such as seeing a doctor, having x-rays taken, or ceasing use of the pesticide.

Moreover, there can be no doubt that Chevron did by 1979 have sufficient information regarding the *general* link between dermal paraquat exposure and lung disease that the company could have been charged with a duty to provide this more specific warning. First, Chevron does not dispute the fact that, since the early 1960's, it has been known that paraquat exposure can lead to fibrotic lung disease. Second, expert witnesses for both sides agreed at trial that, once paraquat enters the body, it selectively attacks the lungs. Finally, the medical literature and the company's own incident reports catalogued cases in which dermal exposure to paraquat in some cases caused almost immediate death and in other cases caused rather immediate lung problems. For example, by 1976 Chevron had learned of an incident in Israel in which a man was accidentally sprayed with a jet of paraquat on his face, nose, mouth and hands; the man recovered after showing some signs of pulmonary involvement. In April of 1976 Chevron learned of a New Guinea man who had his back painted with paraquat and died two days later. That same year, Chevron was informed of a 29-year-old worker from Malaysia who spilled paraquat on his lap and scrotal area and died ten days later. These are but a few of the examples submitted to the jury of cases in which dermal paraquat exposure caused serious injury, including lung disease and death.

Chevron seeks to distinguish these incidents and to establish compliance with its duty to warn by arguing that these incidents all involved *immediate* internal complications resulting from dermal paraquat exposure, whereas Ferebee suffered from delayed and prolonged pulmonary fibrosis. Chevron argues that it had no information that

prolonged exposure to paraquat could cause a *chronic* illness like Ferebee's or that such illness could continue long after exposure to paraquat had ceased. But the fact that the injuries of which Chevron knew occurred much more quickly than the prolonged illness through which Ferebee suffered is no answer to Chevron's complete failure to warn that *any* such injuries, whether immediate or latent, could result from dermal exposure to paraquat. Had Chevron warned that dermal exposure could induce lung disease, the company conceivably might not have had the more focused duty to warn against the particular form and nature of the disease that Ferebee contracted. Absent a general warning about the relationship between such exposure and lung complications, a relationship about which the jury could reasonably have concluded Chevron had substantial knowledge, Chevron cannot escape its duty to warn by asserting that it had insufficient knowledge of the *particular* way in which Mr. Ferebee's lung disease came about. The label gave no indication at all that skin exposure could produce lung disease of *any* sort, a failing upon which the jury could ground liability.

Chevron next argues that, if Ferebee indeed died from chronic paraquat exposure of his skin, his case is so unique as to make him a hypersensitive plaintiff against whose injuries Chevron is not obligated to guard, *see Chambers*, *supra*. Once again, however, Chevron has attempted to define its duty at too specific a level. If paraquat caused Mr. Ferebee's illness, and the jury could reasonably conclude that it did, there is nothing to suggest that another individual in Ferebee's position would not also have been likely to contract the disease. The jury was entitled to find it reasonably foreseeable that illness of the general type from which Mr. Ferebee suffered—fibrotic lung disease leading to death—could be caused by dermal exposure to paraquat. That cases exactly like Mr. Ferebee's, involving dilute solutions of the herbicide and chronic rather than acute injury, had not previously been called to Chevron's attention does not attenuate the

company's duty to warn against the general danger of lung disease and death attributable to dermal exposure to paraquat. *See generally Billiar v. Minnesota Mining and Manufacturing Co.*, 623 F.2d 240, 246 (2d Cir. 1980) ("If the injury is reasonably foreseeable, however, even if rare, the seller cannot rely on its history of good fortune to exempt itself from liability."). As a matter of law, we canot hold it so unforseeable that dermal paraquat exposure could lead to serious lung disease and death that Chevron was insulated from an duty to warn against such a possibility.

Chevron also claims that all cases of dermal paraquat exposure producing serious injury were accompanied by skin lesions which were present either before or after the injury. Ferebee's skin was admittedly intact before exposure and he testified in deposition that he never experienced a rash or any form of cracking or burning sensation. It is unclear whether Chevron raises this point to negate causation or forseeability, but in either case, the point is unpersuasive. If the argument goes to causation, it is again answered by credible expert testimony that paraquat *did* cause Mr. Ferebee's injuries. If Chevron's argument instead is that it had no notice that paraquat exposure to intact skin could lead to serious injury, that argument is belied by the numerous cases in which paraquat absorption through previously intact skin led to nearly immediate death. *See supra* pp. 13-14. Accordingly, Chevron cannot, by pointing to the fact that Ferebee's skin was intact at the time of exposure, avoid the jury's conclusion that the company knew or should have known that dermal exposure to paraquat could cause serious lung disease or death.

D. *Inadequate Labelling as the Proximate Cause of Mr. Ferebee's Pulmonary Fibrosis*

Given that Chevron had a duty to warn that dermal paraquat exposure could produce serious lung disease and death, Mr. Ferebee was still required to show that Chev-

ron's failure to perform that duty was a proximate cause of his illness and death. On appeal Chevron argues that the evidence overwhelmingly suggests that Mr. Ferebee did not read the label that *was* provided and that a more detailed label thus would have done nothing to prevent Ferebee's injuries.

It is true that the plaintiff's failure to read a warning actually provided may at times absolve a manufacturer of liability. *See, e.g., Johnson v. Niagra Machines & Tool Works*, 666 F.2d 1223, 1225 (8th Cir. 1981). It is also true in this case that the district court expressed "some difficulty in agreeing that a rational jury could have found either that Mr. Ferebee read the label or that the label was not adequately designed to attract attention." We need not reexamine the evidence to decide this issue, however, for we hold that satisfaction of the proximate cause requirement does not depend entirely on whether Mr. Ferebee read the label. Instead, if the jury could reasonably have found that the information on an adequately labelled paraquat bottle would have been communicated to Mr. Ferebee—even if he personally did not read the warning—the failure to provide such a warning could validly be treated as a proximate cause of Mr. Ferebee's pulmonary fibrosis.

We live in an organizational society in which traditional common-law limitations on an actor's duty must give way to the realities of society. *See, e.g., MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (1916) (eliminating "privity" requirement for tort suits). In this case, Mr. Ferebee did not purchase the paraquat for his personal use, and there was substantial evidence that workplace communication about the dangers associated with various chemicals usually took the form of oral instructions from supervisors to workers, the latter of whom then retransmitted the information to co-workers. This, rather than individual reading of product warnings, is a typical method by which information is disseminated in the mod-

ern workplace. *See* Schwartz & Driver, *Warnings in the Workplace: The Need for a Synthesis of Law and Communication Theory*, 52 U. CINN. L. REV. 38, 66-83 (1983). The requirement that an improper warning proximately "cause" the injury should be elaborated against this background. We believe Maryland would construe its tort law in this case to require only that *someone* in the workplace have read the label, not that Mr. Ferebee personally have read it. Because there is no dispute that one or more employees at BARC did read the label, we hold that the jury could properly have inferred that, had a warning about the danger of disease from dermal exposure been included on the label, that warning would have been communicated to Mr. Ferebee and that he would as a result have acted differently. Alternatively, the jury could have inferred that an adequate warning would have led Ferebee's *employers* to undertake steps that would have protected him from paraquat poisoning—for example, provision of showers for use after spraying.

Finally, Ferebee's alleged failure to read the label does not constitute misuse as a matter of law, *see Levin v. Walter Kidde & Co.*, 251 Md. 560, 248 A.2d 151 (1968). While a manufacturer is entitled to assume that warnings given will be heeded, *see* RESTATEMENT (SECOND) OF TORTS § 402(A) comment j, in this case Chevron failed to warn Ferebee adequately that dermal exposure to paraquat could seriously injure him. As a result, Ferebee could not have known the results that might follow from his failure to heed a warning that was not given; he therefore cannot be charged with misuse.

In sum, the narrow standard of review of a district court's failure to grant a judgment notwithstanding the verdict provides a very small window for appellant through which it has failed to pass. Sufficient evidence supports the jury's finding that plaintiffs established all the elements of their case by a preponderance of the evidence. We turn now to appellant's claim that the

jury verdict should nonetheless be overturned because other federal law demands that Chevron be immune from tort liability of the sort levied against it in this case.

II. Preemption

Chevron contends that, because paraquat is sold in the United States only when accompanied by a label approved by the federal EPA, a state jury is not allowed in a tort suit to find that label inadequate. Chevron's contention on this point appears to be twofold: first, that EPA approval of the label requires a jury to find that label adequate, and second, that federal law preempts state common law actions against Chevron which are based on the theory that paraquat was inadequately labelled. We reject both of these contentions.

Under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 *et seq.* (1982) ("FIFRA"), EPA extensively regulates the sale and labelling of paraquat. The statute precludes EPA from authorizing the sale of paraquat unless the product, as labelled, will not cause "unreasonable adverse effects on the environment." 7 U.S.C. § 136(c)(5)(c). Such effects are in turn defined as

> any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of [the] pesticide.

7 U.S.C. § 136(b). The Act further requires that the label be "adequate to protect health and the environment" and that it be "likely to be read and understood . . . ." 7 U.S.C. § 136(g)(1)(E).

After extensive scientific testimony, EPA approved the sale of paraquat with the label which is at issue in this case. According to Chevron, this approval constitutes an expert, federal determination that paraquat as labelled does not pose an unreasonable risk to the normal user—

a determination that a jury is not authorized to question. Because the trial court, applying state law, instructed the jury that it could impose liability only if paraquat was "unreasonably dangerous" and the label "inadequate," Chevron concludes that the verdict must be reversed.

Chevron's argument misunderstands the nature of the determination made by EPA and misconceives the relation between federal and state law. The fact that EPA has determined that Chevron's label is adequate *for purposes of FIFRA* does not compel a jury to find that the label is also adequate *for purposes of state tort law* as well. The purposes of FIFRA and that of state tort law may be quite distinct. FIFRA aims at ensuring that, from a cost-benefit point of view, paraquat as labelled does not produce "unreasonable adverse effects on the environment." State tort law, in contrast, may have broader compensatory goals; conceivably, a label may be inadequate under state law if that label, while sufficient under a cost-benefit standard, nonetheless fails to warn against any significant risk. In addition, even if the ultimate purposes of federal and state law in this area are the same, a state (acting through its jurors) may assign distinct weight to the elements which go into determining whether a substance as labelled is of sufficient net benefit as to warrant its use. To approve use and sale of paraquat, for example, EPA was required to assess *inter alia* the health risks from use of paraquat, to assign a cost value to those risks, and to estimate the benefit to society at large from use of the chemical. Unless Congress intended to preempt states from considering these issues, a question we address below, there is no reason a state need strike the same balance on these difficult questions as EPA. Assignment of values to such "soft" variables as human health is among the most difficult tasks faced in a regulatory society, *see* NATIONAL ACADEMY OF SCIENCES, DECISION MAKING FOR REGULATING CHEMICALS IN THE ENVIRONMENT 41 (1975), and a

state may choose to tip the scales more heavily in favor of the health of its citizens than EPA is permitted to by FIFRA. Similarly, a state heavily dependent on agriculture may consider use of paraquat more of a benefit than a state whose economy is primarily industrial, and both states may therefore reach a conclusion different from EPA's regarding the net benefit of paraquat use. Unless FIFRA preempts a state from making these choices, a state jury may find a product inadequately labeled despite EPA's determination that, for purposes of FIFRA, the label is adequate. EPA's determination may be taken into account by the jury, and the jury was instructed in this case that it was permitted to do so, but absent preemption the jury need not give that determination conclusive weight.

That brings us to the heart of Chevron's preemption claim: that FIFRA *does* preempt states from reconsidering such questions and that state tort suits of the sort at issue here are completely preempted by the Act. Chevron's position is grounded upon a section of FIFRA which provides that a state "shall not impose or continue in effect any requirements for labeling . . . in addition to or different from those required under this subchapter." 7 U.S.C. § 136v(b). Chevron argues that a damage action based on the inadequacy of a label has a regulatory aim—to assure that adequate labels are used—and that it is precisely this regulatory aim that FIFRA explicitly preempts.

Damage actions typically, however, can have *both* regulatory and compensatory aims. Moreover, these aims can be distinct; it need not be the case, as Chevron apparently assumes, that the company can be held liable for failure to warn only if the company could actually have altered its warning. (In any event, as we discuss below, Chevron *can* take steps to alter its label). In this case, a Maryland jury found that the EPA-approved label did not sufficiently guard against certain injuries.

Even if Chevron could not alter the label, Maryland could decide that, as between a manufacturer and an injured party, the manufacturer ought to bear the cost of compensating for those injuries that could have been prevented with a more detailed label than that approved by the EPA. That is, Maryland can be conceived of as having decided that, if it must abide by EPA's determination that a label is adequate, Maryland will nonetheless require manufacturers to bear the risk of any injuries that could have been prevented had Maryland been allowed to require a more detailed label or had Chevron persuaded EPA that a more comprehensive label was needed. The verdict itself does not command Chevron to alter its label—the verdict merely tells Chevron that, if it chooses to continue selling paraquat in Maryland, it may have to compensate for some of the resulting injuries. That may in some sense impose a burden on the sale of paraquat in Maryland, but it is not equivalent to a direct regulatory command that Chevron change its label. Chevron can comply with both federal and state law by continuing to use the EPA-approved label and by simultaneously paying damages to successful tort plaintiffs such as Mr. Ferebee.

Imposition of such a dual obligation upon a manufacturer is permissible under the Act. While FIFRA does not allow states directly to impose additional labelling requirements, the Act clearly allows states to impose more stringent constraints on the *use* of EPA-approved pesticides than those imposed by the EPA: "A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter." 7 U.S.C. § 136v(a). *See also* SEN. REP. No. 838 92d Cong., 2d Sess. 30 (1982) *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 4021 ("Generally, the intent of the provision is to leave to the States the authority to impose stricter regulation on pesticides uses than that required under the Act."); SEN. REP. No. 970,

92d Cong., 2d Sess. 44 (1972), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 4128 (same); see generally *National Agricultural Chemicals Association v. Rominger*, 500 F. Supp. 465 (E.D. Cal. 1978) (state may require additional data on EPA-registered pesticides). Given this provision, Maryland might well have the power to ban paraquat entirely. We need not decide that issue, however, to hold that, if a state chooses to restrict pesticide use by requiring that the manufacturer compensate for all injuries or for some of these injuries resulting from *use* of a pesticide, federal law stands as no barrier. The fact that Congress has authorized this form of state action also disposes of any argument that such state tort remedies impose undue burdens on interstate commerce. *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945). As a result, Maryland is entitled to control the use of paraquat for compensatory aims by holding Chevron liable for injuries that could have been prevented by a more adequate label.

Moreover, tort recovery in a case such as this one may also promote legitimate regulatory aims. By encouraging plaintiffs to bring suit for injuries not previously recognized as traceable to pesticides such as paraquat, a state tort action of the kind under review may aid in the exposure of new dangers associated with pesticides. Successful actions of this sort may lead manufacturers to petition EPA to allow more detailed labelling of their products; alternatively, EPA itself may decide that revised labels are required in light of the new information that has been brought to its attention through common law suits. In addition, the specter of damage actions may provide manufacturers with added dynamic incentives to continue to keep abreast of all possible injuries stemming from use of their product so as to forestall such actions through product improvement. That Maryland cannot directly order a change in the way in which paraquat is labelled thus does not deprive the state of legitimate aims which it is entitled to further through the imposition of traditional tort liability.

Moreover, in assessing Chevron's preemption argument and in defining the scope of the Act's preemption provision, it is necessary to bear in mind, as Chevron forgets, the circumspect view courts must take of a claim that Congress has preempted states from exercising their traditional police powers on behalf of their citizens. The provision of tort remedies to compensate for personal injuries "is a subject matter of the kind [the] Court has traditionally regarded as properly within the scope of state superintendence," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144 (1963). In such a case, we have been admonished to "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). That clear and manifest purpose will exist when Congress has explicitly preempted the precise and specific state action, when compliance with both federal and state law would be impossible, or when the state's law stands as an obstacle to accomplishment of the full purposes and objectives of Congress. *Silkwood v. Kerr-McGee Corp.*, 52 U.S.L.W. 4043, 4046 (U.S. Jan. 11, 1984).

As we have indicated, none of these conditions is present in the instant case. First, Congress has not *explicitly* preempted state damage actions; it has merely precluded states from directly ordering changes in the EPA-approved labels. As many state courts have recognized, in general the "mere compliance with [federal or state] regulatory labeling requirements does not preclude a [jury from] finding that additional warnings should have been given." *Burch v. Amsterdam Corp.*, 366 A.2d 1079, 1086 (D.C. 1976) (compliance with labelling requirements of Federal Hazardous Substances Act does not immunize manufacturer from liability for defective warning); *see also, e.g., Stevens v. Parke, Davis & Co.*, 9 Cal. 3d 51, ——, 107 Cal. Rptr. 45, ——, 507 P.2d 653,

661 (1973) (compliance with warnings required by Food and Drug Administration not sufficient to immunize manufacturer from liability); *Blasing v. P.R.L. Hardenbergh Co.*, 303 Minn. 41, ——, 226 N.W. 2d 110, 115 (1975) (compliance with federal and local labelling requirements does not preclude finding of negligence); *Maize v. Atlantic Refining Co.*, 352 Pa. 51, ——, 41 A.2d 850, 853 (1945) (label approved by Surgeon General not adequate as a mater of law); *see generally* Restatement (Second) of Torts § 288c (1965) (Generally, "[c]ompliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions."). Given this general background of interpretative decisions against which Congress acted, and given the clear authority of states to regulate the "use" of paraquat, the Act cannot be said to express with the requisite clarity and intent to bar damage actions based on the inadequacy of an EPA-approved label.

Second, compliance with both federal and state law cannot be said to be impossible: Chevron can continue to use the EPA-approved label and can at the same time pay damages to successful tort plaintiffs such as Mr. Ferebee; alternatively, Chevron can petition the EPA to allow the label to be made more comprehensive.

Third, state damages actions of the sort at issue here do not stand as an obstacle to the accomplishment of FIFRA's purposes. Such a conflict would exist only if FIFRA were viewed not as a regulatory statute aimed at protecting citizens from the hazards of modern pesticides, but rather as an affirmative subsidization of the pesticide industry that commanded states to accept the use of EPA-registered pesticides. That interpretation of FIFRA, however, is precluded by both the explicit savings clause at 7 U.S.C. § 136v(b) and by the entire legislative history of the Act. Of equal importance, federal legislation has traditionally occupied a limited role as the

floor of safe conduct; before transforming such legislation into a *ceiling* on the ability of states to protect their citizens, and thereby radically adjusting the historic federal-state balance, *United States v. Bass*, 404 U.S. 336, 349 (1971), courts should wait for a clear statement of congressional intent to work such an alteration. The Supreme Court has often counselled such hesitance. Thus, in *Nader v. Allegheny Airlines*, 426 U.S. 290 (1975), the Court held that, even were the Civil Aeronautics Board to find that an action was not a "deceptive" one within the meaning of the Fdeeral Aviation Act of 1958, a state jury remained entitled to find that action fraudulent. That the action was permissible under federal law did not mean, in the absence of a clear congressional intent to promote the action, that states were required to tolerate it. *See also Silkwood v. Kerr-McGee Corp.*, 52 U.S.L.W. 4043 (U.S. Jan. 11, 1984) So too in this case the fact that Congress has chosen to allow the states to regulate the use of pesticides approved by the EPA means that states retain the lesser power to control the use of such pesticides by requiring that at least some of the resulting injuries be compensated In response, Chevron perhaps will choose not to send paraquat into Maryland; perhaps the company will distribute additional information on paraquat to Maryland users; or Chevron may petition the EPA to be allowed to use a more detailed label. What Chevron cannot do, however, is to force states, under the purported aegis of a statute aimed at protecting against the hazards of modern pesticides, to accept the use of paraquat and to tolerate uncompensated injuries to that state's citizens. Congress has not expressed a "clear and manifest purpose" to achieve such a result; on the contrary, protection of pesticide users and victims by *both* federal and state law lies at the center of the Act's design. Accordingly, we affirm the decision of the district court and allow the jury's verdict to stand.

It is so ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

September Term, 1983

Civil Action No. 81-01129

No. 83-1106

RICHARD LEANDER FEREBEE

v.

CHEVRON CHEMICAL COMPANY,
Appellant

[Filed Jun. 12, 1984]

ORDER

It is ORDERED, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See Local Rule 14, as amended on November 30, 1981 and June 15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

FOR THE COURT

GEORGE A. FISHER
Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 81-1129

RICHARD LEANDER FEREBEE, JR., *et al.*,
Plaintiffs,

v.

CHEVRON CHEMICAL COMPANY,
Defendant.

Dec. 20, 1982

MEMORANDUM AND ORDER

OBERDORFER, District Judge.

This products liability case is before the Court on defendant's motion for judgment notwithstanding the verdict. On November 4, 1982, a jury of six rendered a verdict for plaintiffs in the amount of $60,000.[1] Because the Court is convinced that there was sufficient evidence as a matter of law to support the jury's verdict defendant's motion is denied.

I. *Facts of the Case*

Richard Leander Ferebee, the original plaintiff in this case, began work as an agricultural worker at the Beltsville Agricultural Research Center (BARC), an installation of the United States Department of Agriculture, in Beltsville, Maryland, in 1967. Mr. Ferebee's job frequently

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[1] The Court subsequently entered an additional judgment for plaintiffs in the amount of $77,500, pursuant to a stipulation between the parties.

required him to spray various chemicals on the plants, including insecticides and herbicides, both inside the greenhouses and, in the summer, outside in the fields. Mr. Ferebee began spraying paraquat, a herbicide, in the summer of 1977. He used the product periodically during the outdoor growing seasons of 1977, 1978, and 1979.

Mr. Ferebee learned how to mix and spray paraquat primarily through the oral instructions and demonstrations of his supervisors and co-workers, rather than from the written instructions on the label. Whether Mr. Ferebee ever read the label at all later became the subject of considerable controversy between the parties.[2]

When Mr. Ferebee sprayed paraquat in the fields, he frequently got the dilute spray on his skin,[3] most frequently when he used his hands to shield plants while he sprayed weeds growing around them. In his testimony, he described two incidents of significantly greater exposure. The first incident occurred soon after he began using paraquat. On that day, he spent several hours walking behind a tractor that was spraying paraquat. His head and bare arms became drenched with spray.[4] At the end

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[2] *See* pp. 1302-1304, *infra*.

[3] There was no evidence that Mr. Ferebee ever spilled concentrated paraquat on his skin or clothing. His only contact was with a solution of dilute paraquat, presumably mixed in the proportions recommended on the label. The parties also stipulated, as Mr. Ferebee testified (and there was no evidence to the contrary), that Mr. Ferebee's only significant exposure to paraquat was on his intact skin; i.e., there was no evidence that Mr. Ferebee swallowed or inhaled paraquat, or that he spilled or sprayed it on an area of his skin upon which he had any apparent cuts or scrapes. The jury was not, of course, precluded from concluding that a person engaged in Mr. Ferebee's line of work could have had some, or even many, minor cuts or abrasions not readily discernable to the naked eye or likely to be remembered some time later.

[4] Defendant argued that Mr. Ferebee's testimony did not describe any drenching of Mr. Ferebee's shirt or other clothes on that day. Since Mr. Ferebee was no longer alive at the time of

of the day, he began to feel dizzy and exhausted. When he went home, he did not even wash or change his clothes, but fell asleep instantly. However, the dizziness and other symptoms did not persist, and he later returned to work.

Mr. Ferebee's other major single exposure to paraquat ocurred later the same season. On that day, he was spraying weeds in the field, using a hand-held sprayer.[5] He had been spraying for some time when he noticed that the sprayer was defective and had leaked paraquat solution all over his pants. He stopped spraying and cleaned up as much as possible; however, he was not able to change his clothes until he went home.

Mr. Ferebee testified that he always washed his hands after using paraquat and was very careful not to touch his face when he had paraquat on his hands, because his co-workers had warned him that paraquat was dangerous if swallowed.[6] However, BARC did not have shower facilities for its employees, and Mr. Ferebee rarely, if ever, changed his clothes during the work day.[7]

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trial, he was not available to clarify this point. It would, however, have been perfectly reasonable for the jury to infer from his description of the incident that his clothes became wet from the spray.

[5] This was how Mr. Ferebee usually applied paraquat.

[6] There is no question that the label on the paraquat container gave considerable warning of this danger.

[7] Under instructions from his supervisor, Mr. Ferebee wore a protective coverall and/or respirator in the winter when spraying in the greenhouse. However, when spraying outside, he was not required or advised to use these items. Plaintiffs and their witnesses gave several reasons for this, including the greater wind and lower angle of spray outside, which reduced the exposure to the chemical, the heat, which made the wearing of a heavy waterproof suit extremely difficult in the hot and humid summer weather, and Mr. Ferebee's sinus problems, which made it very difficult for him to breath through a respirator.

Up until late 1977, Mr. Ferebee was in reasonably good health, although he did suffer from some health problems. For example, he had a life-long sinus problem. He was overweight during the mid-1970's, and he suffered from high blood pressure. However, according to the doctors who later treated him, none of these problems were life-threatening or seriously disabling, although he did suffer from some shortness of breath. He had no known lung problems before he began spraying paraquat.

In late 1977, Mr. Ferebee began noticing a marked change in his physical condition, notably a substantial in crease in shortness of breath. During the next four and a half years, his condition deteriorated steadily. He was hospitalized several times, and consulted a number of doctors, including Dr. Muhammad Yusuf, a practicing pulmonary specialist, and Dr. Ronald G. Crystal, Chief of the Pulmonary Branch of the Heart, Lung and Blood Institute of the National Institutes of Health. His condition was diagnosed as pulmonary fibrosis. After taking Mr. Ferebee's history [8] and performing a number of tests,[9] the treating physicians identified paraquat poisoning as the cause of the pulmonary fibrosis. All other known causes of pulmonary fibrosis were ruled out,[10] and, as Drs. Yusuf and Crystal testified at trial, the diagnosis of paraquat poisoning was made, to a reasonable degree of medical certainty, long before Mr. Ferebee's death.

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[8] Paraquat is excreted from the body very soon after it is taken in. The doctors therefore had to rely on the history of paraquat exposure rather than any detection of paraquat in Mr. Ferebee's body.

[9] These included pulmonary function tests, a liver biopsy, gallium scans, and x-rays.

[10] As defendant pointed out over and over again at trial, a substantial number of cases of pulmonary fibrosis are "idiopathic," i.e., their cause is unknown. At trial, defendant and its experts characterized idiopathic pulmonary fibrosis (IPF) as a distinct disease, with an identifiable pattern of symptoms. Plaintiffs and

Mr. Ferebee instituted this suit in 1981, against Chevron Chemical Corporation, the sole distributor of paraquat in the United States.[11] On the eve of trial, on March 18, 1982, Mr. Ferebee died. A survival action was continued by his estate, and a wrongful death count was added on behalf of Mr. Ferebee's minor children. The amended complaint alleged negligence, breach of warranty, and strict liability, all stemming from defandant's alleged failure to provide an adequate warning that dermal exposure to paraquat could cause serious lung disease and death. Punitive damages were also sought. At the end of the 2½ week trial, the Court directed a verdict for defendant on the punitive damages claim. The negligence and breach of warranty claims were also dropped, and only the product liability claim was submitted to the jury.

After 3 days of deliberation, the jury was hopelessly divided, and the Court declared a mistrial. The case was tried for the second time in October, 1982.[12]

At the second trial, plaintiffs presented excerpts from a videotape deposition of Mr. Ferebee taken before his death. Mr. Ferebee described his medical history and the circumstances surrounding his employment and exposure to paraquat. Plaintiffs' live witnesses included Drs. Yusuf and Crystal, who described their treatment of Mr. Ferebee and the considerations underlying their

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their experts, on the other hand, characterized IPF as a group of pulmonary fibrosis types with different, as-yet-unknown, causes. They claimed to have identified paraquat poisoning as the cause of one type of pulmonary fibrosis that would have been characterized of IPF if the history of paraquat exposure had not been known.

[11] Mr. Ferebee's employer, BARC, was not a party.

[12] The second trial was considerably shorter than the first one. All evidentiary rulings from the first trial, with the exception of some items of testimonial evidence, were carried over to the second trial, with all objections preserved.

diagnosis of paraquat poisoning, including Mr. Ferebee's medical history, laboratory tests, consultations with other doctors, and the medical literature on other cases of paraquat-induced illness. Members of Mr. Ferebee's family also testified about their observations of his illness and the children's loss of solatium. One of Mr. Ferebee's co-workers testified about paraquat use at BARC by Mr. Ferebee and others.[13]

Defendant's live testimony focused primarily on the issue of whether paraquat caused Mr. Ferebee's illness and death. Dr. H. Kenneth Fisher, a pulmonary specialist who acts as a part-time consultant to defendant on paraquat, and Dr. Charles Carrington, a pathologist who was once involved in the treatment of a confirmed case of paraquat poisoning, gave their opinion that Mr. Ferebee's illness was not caused by paraquat.[14] Dr. Henry Wagner, a distinguished independent radiologist, testified that the gallium scans taken of Mr. Ferebee's co-workers were negative.[15] Defendant concluded by presenting evidence that the label on the container of paraquat Mr. Ferebee used complied with EPA labelling regulations in force at that time. Defendant also called a BARC employee, who testified that when he sprayed paraquat (usually from a tractor), he wore protective clothing.

At the close of the evidence, the Court reaffirmed its directed verdict on the punitive damages issue and submitted the rest of the case to the jury on the issue of strict product liability. The Court instructed the jury that plaintiffs had the burden of proving all of the following elements by a preponderance of the evidence:

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[13] Plaintiffs' counsel read into the record the earlier testimony of Dr. Jon E. Ford, a toxicologist employed by Chevron, along with a number of stipulations on miscellaneous factual issues.

[14] Defendant's experts identified Mr. Ferebee's illness as IPF.

[15] Dr. Crystal disagreed.

1. That paraquat proximately caused Mr. Ferebee's illness and death;

2. That paraquat is inherently dangerous;

3. That defendant knew, or should have known, at the time it sold the paraquat used by Mr. Ferebee, that paraquat is inherently dangerous;

4. That the resulting duty to provide an adequate warning of the danger was not met; and

5. That the inadequacy of the warning proximately caused Mr. Ferebee's illness and death.

The jury was further instructed that if plaintiffs proved these elements, defendant had the burden of proving its defense of misuse.[16]

The pecuniary damages suffered by plaintiffs were the subject of a stipulation between the parties. The jury was instructed to consider only nonpecuniary losses if it came to the point of assessing damages. After four hours of deliberation, the jury returned a verdict for plaintiffs and awarded $60,000 in the wrongful death action.[17] Judgment was entered on this verdict, and a separate judgment was entered for plaintiffs on the stipulation in the amount of $77,500. It is these judgments that defendant now attacks.[18]

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[16] A summary of these instructions, describing the issues to be decided and the order in which the jury should consider them, was provided to the jury for reference in the jury room.

[17] The jury awarded no damages in the survival action. The stipulation, however, recognized $60,000 in pecuniary damages in the survival action, and the Court awarded the estate this amount on the basis of the jury's general finding of liability.

[18] The judgment on the stipulation was dependent upon the jury's verdict imposing liability on defendant. Therefore, were judgment n.o.v. appropriate here, both judgments for plaintiffs would have to be vacated.

II. *Motion for Judgment N.O.V.*

Defendant's motion for judgment n.o.v. raises a number of issues upon which defendant claims the evidence either requires an outright finding in its favor or is at least insufficient to support a finding for plaintiffs. These issues will be discussed in the order in which they are presented in defendant's motion.

A. *Susceptibility*

Defendants' first argument is that it cannot, as a matter of law, be held liable for injuries sustained by a particularly susceptible individual. *Chambers v. G.D. Searle & Co.*, 441 F.Supp. 377, 380 (D.Md. 1975), *aff'd.*, 567 F.2d 269 (4th Cir. 1977), a breach of warranty case, is cited in support of this proposition. Defendant argues that Mr. Ferebee's injury was the first of its kind to be attributed to paraquat, and that Chevron can only be held liable if it knew that paraquat was dangerous "to a substantial number of the population." Jury Instruction, Tr. at 2097; Restatement (Second) of Torts § 402A comment j. Since Mr. Ferebee's injury was unique, defendant argues, it by definition was not a danger to a substantial number of the population.

This argument depends upon a major fallacy, which runs throughout many of the arguments defendant has made to the Court—and to the jury—in this and other contexts. This fallacy consists of the confusion of two logically distinct issues in the case: (1) whether paraquat caused Mr. Ferebee's illness, and (2) whether Chevron had notice at the time it packaged the product used by Mr. Ferebee that illness of this kind could result if an adequate warning was not given. Evidence on the alleged "uniqueness" of Mr. Ferebee's illness was important to both these issues, but in very different ways.

In arguing that Mr. Ferebee's illness was not caused by paraquat, defendant pointed to a number of dissimilarities between Mr. Ferebee's case and most confirmed

cases [19] of paraquat poisoning. First, the circumstances of the exposure differed from most cases in that it consisted totally or almost totally of exposure of intact skin [20] to a dilute solution of paraquat. There were also varied differences in the symptoms and course [21] of the illness. Defendant claimed that this was the only case of long-term pulmonary fibrosis resulting from exposure of intact skin to diluted paraquat. Plaintiffs disagreed, pointing to evidence of a few other cases that they claimed were markedly similar in nearly all respects and many others that were similar in some respects. Whether Mr. Ferebee's case was in fact unique rather than one of a few with this specific exposure, symptoms, and course was clearly a question for the jury to decide. It is clear, however, that cases exactly like Mr. Ferebee's are rare. The question is: how does that fact affect plaintiffs' case?

The relevance of this evidence to the causation issue is obvious. If Mr. Ferebee's illness differs from most cases of paraquat poisoning, it can be argued that it most likely was not caused by paraquat. If most people who get sick from exposure to paraquat have different kinds of exposure, demonstrate different symptoms, have different test results, and/or die or recover in a different span of time, then the likelihood of Mr. Ferebee's illness being paraquat poisoning would seem to decrease. However, this "uniqueness" argument is far from determinative on the causation issue. Plaintiffs presented evidence of other cases that were very similar to Mr. Ferebee's. Moreover, the experts who diagnosed Mr. Ferebee's illness testified that: (1) similarity to other cases was

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[19] That is, confirmed by defendant.

[20] *See* note 3, *supra*.

[21] Nearly all cases of paraquat poisoning described by both parties ended in either death or complete recovery in a relatively brief period, usually less than a year. Mr. Ferebee survived for approximately 4½ years.

only one of several factors underlying the diagnosis, and (2) 100 percent identity of symptoms and other factors with any particular number of cases was not as important as the fact that each of Mr. Ferebee's test results and symptoms correlated with those of an identifiable group of paraquat victims. Thus, plaintiffs' evidence, taken as a whole, built a plausible claim that each stage and symptom of Mr. Ferebee's illness could be traced to paraquat. Even if the jury agreed with defendant's contention that the course of Mr. Ferebee's disease was rare, therefore, there was plenty of evidence on plaintiffs' side to support a verdict that the disease was caused by dermal exposure to paraquat.

The rarity of Mr. Ferebee's case is also relevant to the issue of notice. The important question here is whether this impact from use of the product was foreseeable. If Mr. Ferebee's illness was an unforeseeable fluke resulting from his own peculiar susceptibility, then defendant could not be charged with a duty to foresee this injury and warn against it.[22] On the other hand, "[if] the injury is reasonably foreseeable, . . . even if rare, the seller cannot rely on its history of good fortune to exempt itself from liability." *Billiar v. Minnesota Mining & Mfg. Co.*, 623 F.2d 240, 246 (2d Cir. 1980).

On this issue, evidence of comparison between Mr. Ferebee's case and others has a different complexion. Many items that are important on the causation issue, particularly those dealing with the symptoms and course of the illness, have no relevance whatsoever on the issue

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[22] The Restatement (which is the source of the "substantial number of the population" language in the jury instruction) discusses this concept in terms of allergies. Even the most innocuous of everyday substances may produce allergic reactions in a tiny number of people. Only those presenting a danger to a substantial number must give a warning of the danger of such a reaction. Similarly, if Mr. Ferebee's illness was the result of a reaction to paraquat unlikely to be repeated in others, Chevron had no duty to warn of it.

of notice. For example, if most paraquat victims develop skin lesions before dying, while Mr. Ferebee did not, the causation of Mr. Ferebee's illness can be called into question, but defendant's notice that dermal exposure to paraquat causes death cannot. There was no alleged need for the label to give full details of the symptoms and course of the illness that would precede death. If Mr. Ferebee's illness was caused by paraquat, and the jury necessarily concluded that it was, then the only question on the notice issue is whether defendant knew that illness *of this general type* (i.e., fibrotic lung disease leading to death) could be caused by dermal exposure[23] to dilute paraquat,[24] or should have known about it, considering the numerous reports of fatal lung disease—of some kind—resulting from dermal exposure—of some kind—to paraquat.

B. *Chevron's Knowledge in 1979 and Before*

Defendant argues that, since its duty to warn of the dangers of using paraquat was dependent upon its rea-

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[23] Defendant stressed that Mr. Ferebee's exposure was to intact skin. They argued that every other case involved skin lesions either before (i.e., helping to cause) the injury or after (i.e., caused by) the injury. The former is relevant to the notice issue, but the latter is not. As long as there were a significant number of other cases in which the skin was intact *at the itme of exposure*, then the jury could properly conclude that there was enough notice to give rise to a duty to warn, even if those other cases, unlike Mr. Ferebee's, involved skin lesions *after* the exposure.

[24] Of course, since the label did not warn that dermal exposure to *undiluted* paraquat could cause death (which defendant apparently did know), the question of whether a warning about *dilute* dermal exposure was necessary is something of a red herring. If such a warning had been given about undiluted paraquat, then defendant could have raised the dilution issue in the context of the adequacy of the warning. Since no such warning was given, however, it is somewhat disingenuous for defendant to argue that it had no duty to give a warning about a lesser exposure because it was known to be less dangerous than a greater exposure—of which defendant also did not warn.

sonable knowledge of those dangers, at the relevant time, *Chamber v. G.D. Searle & Co.*, 441 F.Supp. at 381, it had no duty to warn of the danger of contracting chronic (i.e., long-term) pulmonary fibrosis from dermal exposure to paraquat. Defendant points out that the three cases allegedly similar to Mr. Ferebee's were all reported after the period at issue.[25] Therefore, defendant argues, it had no duty, at the time, to warn of this particular danger.

The flaw in this argument is again the narrow classification of the danger at issue. There was plenty of evidence that defendant had notice, through both its own incident reports and cases reported in the medical literature,[26] that dermal exposure to paraquat could cause lung disease and death, albeit not necessarily after an illness as prolonged as Mr. Ferebee's. Having failed to warn that dermal exposure to paraquat can cause death almost immediately, defendant is hardly in a position to argue that it did not know, and therefore had no duty to warn, that the product could cause a similar death preceded by a long and painful illness. Similarly, since there was no warning on the paraquat label about the danger of exposure to broken skin—which might conceivably have provided a legally sufficient warning in this

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[25] Although none of these were reported before 1979, however, plaintiffs raised some question about whether defendant might have had knowledge of at least one of these cases before it was reported in the medical literature.

[26] In its reply memorandum, defendant resurrects its earlier argument that many of these cases "don't count," because they took place outside the United States and did not involve Chevron's U.S. label. This fact has absolutely no relevance to the causation issue, since the label is not a factor in the physical impact of paraquat in the body. Its importance to the notice issue is not much greater, since there was plenty of evidence that there was full sharing of information and incident reports among foreign and domestic sellers of paraquat.

case[27]—the fact that Mr. Ferebee's skin was apparently intact is irrelevant.

This is not a situation in which defendant is being charged with notice of an unforeseeable and drastically different type of illness. There was sufficient evidence to support the jury's finding that defendant knew, before 1979, that dermal exposure to paraquat could cause fatal lung disease.[28] Defendant might not, based on this evidence, be charged with a duty to warn about possible serious damage to other organs of the body by paraquat,[29] but a duty to warn about serious lung damage—of any type similar to that earlier reported—could be inferred.

C. *Causation*

Chevron argues further that there was insufficient evidence to support the jury's finding that Mr. Ferebee's illness and resulting death were the proximate result of paraquat poisoning. They point to the very small number of cases of paraquat poisoning in the world, and argue that even these cases are so different from Mr. Ferebee's that his must be classified as "unique." As a unique case, defendant argues, Mr. Ferebee's case can be classified as paraquat poisoning only by the use of "unreasonable inferences" that are "at war with the undisputed facts." *Marcoux v. Van Wyk*, 572 F.2d 651, 653 (8th Cir.), *cert. dismissed*, 439 U.S. 801, 99 S.Ct. 58 L.Ed.2d 94 (1978).

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[27] The jury could well have inferred from the evidence that minor cuts and abrasions are common enough occurrences for a person working with his hands in the fields and with tools that limiting a warning to users with broken skin might have sufficed, but that some warning of the lethal consequences of skin exposure was in order.

[28] According to experts for both parties, lung damage is the classic result of paraquat poisoning caused by any type of exposure.

[29] There was, of course, no evidence at trial that any organ other than the lung (and the skin at the point of exposure) is ever damaged seriously by paraquat.

There were expert opinions on both sides of this issue. In such a situation, the weight to be given each expert opinion is exclusively for the jury. *Jenkins v. United States*, 307 F.2d 637, 646 (D.C.Cir. 1962). Drs. Crystal and Yusuf were both experts eminently qualified in pulmonary medicine. They were both among Mr. Ferebee's treating physicians, a qualification shared by none of defendant's experts.[30] Moreover, the expert opinions they presented at trial were based on considerations going far beyond the statistics upon which defendant places such reliance. Each testified at length about the diagnostic tools he had used in Mr. Ferebee's case. Both agreed that cases like Mr. Ferebee's were rare, but Dr. Crystal identified three other cases that he felt to be nearly identical to Mr. Ferebee's, as well as many others that he considered to be similar in important respects. Dr. Crystal described each of Mr. Ferebee's symptoms and test results in detail, comparing each with similar results in other confirmed cases of paraquat poisoning. Dr. Crystal admitted under cross-examination that some of Mr. Ferebee's symptoms were different from the pattern established in many other cases of paraquat poisoning, but he explained many of these differences, quite plausibly, as attributable to the fact that Mr. Ferebee, unlike most paraquat victims, did not die immediately. Many of these additional symptoms, he explained, would develop more slowly and would not appear until the person had been ill—but still alive—for some time.

Defendant produced its own highly qualified experts on the causation issue, Drs. Fisher and Carrington. These experts explained in equal detail the considerations underlying their opinion that Mr. Ferebee's illness was not caused by paraquat. This testimony was substantial, but far from so overwhelming that the jury had no choice

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[30] Dr. Crystal, a government employee who is one of the leading experts in the United States on pulmonary fibrosis, testified voluntarily at the trial without remuneration.

but to accept it. It was for the jury to decide which set of expert opinions to accept, and they chose to accept those of Drs. Crystal and Yusuf.

D. *Dr. Fisher's Calculations and the Scientific Method*

Dr. Fisher, one of defendant's experts, calculated what he believed to be the maximum amount of paraquat that could have entered Mr. Ferebee's body. Relying on animal studies and a few cases of paraquat poisoning of humans, he concluded that this amount was many times too small to have caused lung injury.

Defendants also argue, based upon the evidence of Dr. Carrington, that plaintiffs' experts did not base their conclusions upon proper scientific methodology, as is required of a medical expert. *Reed v. State*, 283 Md. 374, 391 A.2d 364 (1978). Dr. Carrington stated that the only proper way to establish a medical hypothesis scientifically would be either to do a number of animal studies on the subject or to conduct a population study, surveying a large number of cases. Since cases of dermal paraquat poisoning of any kind are so rare, a population study is impossible, and, according to Dr. Carrington, animal studies have not yet been done in sufficient number to support the hypothesis that dermal exposure can cause this kind of disease.

It is true that medical expert testimony must be grounded in proper scientific methodology, but the extremely stringent standard that defendant suggests is beyond reason. Product liability law, especially as it relates to relatively new products or those with a relatively rare yet significant danger, would be rendered next to meaningless if a plaintiff could prove he was injured by a product only after a "statistically significant" number of other people were also injured. A civilized legal system does not require that much human sacrifice before it can intervene. The fact that this is the first case of this exact type—or at least the first of its

exact type in which the involvement of paraquat was discovered by alert doctors—cannot be enough by itself to shield defendant from liability. Defendant's experts were not able to fault Dr. Crystal for his basic diagnostic methodology; in fact, they used the same kinds of test results, consultations, and other tools that he did. What they disagreed with chiefly were his conclusions.

Defendant makes much of Dr. Fisher's testimony that:

> I think [Dr. Crystal's theory] is new in the sense that I am not familiar with anyone who feels, as Dr. Crystal does, that these changes in these lung biopsies . . . are not perfectly compatible with idiopathic pulmonary fibrosis.

Tr. at 1176. Aside from the fact that Dr. Crystal did *not* deny that the lung biopsy was consistent with IPS,[31] the diagnosis of paraquat poisoning on the part of Mr. Ferebee's treating physician, which was not contradicted by any physician who actually treated—or even examined—Mr. Ferebee, cannot be held legally insufficient merely because a consultant for defendant claimed to know of no one (other than, presumably, plaintiffs' other experts), who agreed with him.

As for Dr. Fisher's calculation of the amount of paraquat absorbed by Mr. Ferebee's body, the Court is not convinced that it meets defendant's own rigorous scientific standards, since again no population study existed and no more than a handful of animal studies were available. Even more important, however, the human cases with which Mr. Ferebee was compared and which purported to demonstrate the amount of exposure that would cause lung damage all involved acute, short-term illness. Proof that a certain amount of paraquat is necessary to cause

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[31] Dr. Crystal characterized the biopsy as unusual for IPF, but not inconsistent with it. It was only when he considered this test in conjunction with many other factors that he became confident of his diagnosis.

short-term illness cannot be held to demonstrate conclusively, as a matter of law, that the same amount is necessary to cause a chronic case like Mr. Ferebee's. Therefore, even though plaintiffs presented no equally specific evidence on exposure to contradict Dr. Fisher, it was permissible for the jury to give this evidence less than conclusive weight.

E. *"Contraditions" in Dr. Yusuf's Testimony*

Defendant argues that Dr. Yusuf's testimony was self-contradictory and therefore legally without effect. *Voss v. City of Baltimore*, 246 Md. 345, 228 A.2d 295 (1967). They point out that, during direct examination, Dr. Yusuf expressed his opinion on causation "to a reasonable degree of medical certainty," Tr. at 243, and that on cross-examination, the following was said:

> Q. And am I also correct that you cannot rule out, to a reasonable degree of medical certainty that what Mr. Ferebee had was what we know in medicine as idiopathic pulmonary fibrosis?
>
> A. I cannot rule it out.

Defendant argues that the two statements were contradictory, and therefore Dr. Yusuf's opinion was useless to support a verdict.[32]

This is one of a number of debater's points in which defendant semes to specialize. It is perfectly apparent to the reasonable observer what Dr. Yusuf meant by these statements. He was sure of his diagnosis, but like any good scientist, he was loathe to rule out any remotely

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[32] The Court is not certain why this argument is being made at all, since it was Dr. Crystal, not Dr. Yusuf, who was plaintiffs' principal expert witness. Even if this portion of Dr. Yusuf's opinion could not be allowed to stand, it would be harmless error. Moreover, defendant made no objection to this testimony at the time.

rational hypothesis completely. The confusion, if there was any, was of defendant's own doing when defendant's counsel used the term "to a reasonable degree of medical certainly." It should be noted that counsel, not Dr. Yusuf, used these precise words to characterize his answer. This phrase was used over and over at trial in similarly awkward contexts because of defendant's insistence that all medical opinions of any kind must, under Maryland law, use those magic words.

In fact, it was to disallow precisely this kind of question at the second trial that defendant took this position. Defendant convinced the Court after the first trial that it had been error to allow plaintiffs' counsel to ask defendant's experts if they could completely rule out paraquat as the cause of Mr. Ferebee's illness. The Court agreed that this type of question was improper, and that this flaw could not be cured by merely using the words "to a reasonable degree of medical certainty" in the question. As is clear from Dr. Yusuf's answer, these words do not significantly alter the question's meaning in the ears of the hearer, or if they do, they cause confusion.[33] If the Court committed any error here, it was in allowing defendant to ask this question in the first place.

F. *Causation: Reading the Label*

Even if defendant had a duty to warn that dermal exposure to paraquat could cause death, defendant's liability for Mr. Ferebee's injury depends ultimately upon whether plaintiffs proved that the failure to give such a

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[33] The fact that "reasonable degree of medical certainty" is not a normal term in the doctor's vocabulary, was underscored during defendant's cross-examination of Dr. Crystal. In responding to a question about his conversation with another doctor, Dr. Crystal conscientiously expressed his answer in those terms only to be met with a sarcastic question from counsel for defendant: "Are those the words he used, 'within reasonable medical certainty'? Is that how you talk to other doctors?" Tr. at 683.

warning was the proximate cause of the injury. Defendant argues that there is overwhelming evidence that Mr. Ferebee did not read the paraquat label. Therefore, defendant argues, a different label, warning of the danger in great detail, would not have prevented the injury, since it, too, would have gone unread.

Plaintiffs answer this argument with two points. First, plaintiffs argue, Mr. Ferebee said that he *saw* the label, therefore the jury could infer that he *read* it. Second, plaintiffs point out that the adequacy of a warning depends, not only on its content, but also on its ability to catch the eye, inducing the user to read it. Plaintiffs argue that this was also a jury issue and that the jury could have concluded that the label was not designed to attract the attention of a reasonably prudent person.

The Court has some difficultly in agreeing that a rational jury could have found either that Mr. Ferebee read the label or that the label was not adequately designed to attract attention. Neither of these questions have to be decided, however, for the simple reason that, contrary to defendant's argument, the proximate cause requirement does *not* rest entirely on whether Mr. Ferebee read the label.

Defendant cites a number of cases in which a plaintiff's failure to read the warning given absolved the seller of liability. The Court agrees that this is a sound principal in the run-of-the-mill product liability case in which all parties involved expect the warning label to be the principal source of information for the user about the product's uses and dangers. For example, both the purchaser and the seller of a child's pajamas would expect the principal if not only, source of infomation about flammability would be contained in or on the pajamas themselves and the package in which they are distributed. If the purchaser would not have read the label in any event, the inadequacy of the warning given cannot by

itself provide a basis for liability.[34] *Mattocks v. Daylin, Inc.*, 78 F.R.D. 663, 667-68 (W.D.P. 1978), *rev'd and remanded on other grounds*, 611 F.2d 30 (3d Cir. 1979).

Mr Ferebee's situation was quite different, however. He did not purchase paraquat for his personal use; rather, it was provided to him by his employer for use on the job. The evidence showed that his principal source of information about paraquat was the oral instructions of his supervisors and co-workers, not the written label. He learned from them how to mix the product and how to spray it. It was also from this source that he learned of the danger of getting the product in his mouth: one of his co-workers warned him that if he accidently swallowed paraquat, it would "get in his blood" and poison him.

This is a common pattern of instruction and use of occupational materials in the workplace. Learning by doing and learning by oral instruction are tried and true methods of educating manual workers in their jobs.[35] Therefore, although it is crucial to plaintiff's case that *someone* would have read the label it was not necessary for Mr. Ferebee to have done so. And it is obvious that one or more employees at BARC *did* read the label, since information did reach Mr. Ferebee about the proportions for diluting the product and about the dangers about which the label did warn. It was appropriate for the jury to infer that a warning about the danger of

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[34] However, it should be no defense to a claim of an infant plaintiff who was burned by flammable garments that the infant could not read.

[35] *Cf.* Restatement (Second) of Torts § 402A comment h (duty to warn of danger arising from a "particular use" that is foreseeable). The fact that many workers using a product ordinarily receive oral instructions from their supervisors has been used in some products liability cases to *insulate* the manufacturer from liability for a worker's injuries when the supervisor, but not the worker, received a warning of the danger. *See, e.g., Bryant v. Hercules, Inc.*, 325 F.Supp. 241 (W.D.Ky. 1970).

fatal lung disease from dermal exposure would also have been communicated to Mr. Ferebee.[36] See Restatement (Second) of Torts § 388 comment n (seller normally entitled to assume that adequate warning will be passed on by purchaser to ultimate user); *cf. Chambers v. G.D. Searle & Co.*, 441 F.Supp. at 381 (in product liability case involving prescription drug, relevant warning is the one given to doctor, not patient).

G. *Compliance with Federal Regulations*

Defendant also argues that the warning it provided on the paraquat label was adequate as a matter of law, because it complied with then-existing regulations of the Environmental Protection Agency.[37] There is no reason to reconsider this previously rejected argument. Pretrial Order at 4 (March 26, 1982); *Hubbard-Hall Chem. Co. v. Silverman*, 340 F.2d 402 (1st Cir. 1965); *Burch v. Amsterdam Corp.*, 366 A.2d 1079 (D.C. 1979); *D'Arienzo v. Clairol, Inc.*, 125 N.J.Super. 224, 310 A.2d 106 (1973).[38]

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[36] The second half of the proximate cause issue, the question of whether Mr. Ferebee would have acted differently had he been warned of this danger, was answered by Mr. Ferebee himself, who testified that he would not have used paraquat at all if he had known the extent of the danger. Moreover, the jury could have inferred that the precautions imposed by Mr. Ferebee's employers might have been different had *they* known of the danger. For example, they might have required all workers using paraquat to wear protective clothing. They might have provided showers for use after spraying. Or they might have sought to substitute a different, less dangerous herbicide.

[37] These regulations have since been changed to require the label to warn against use by any but specially registered users. The exhibits prepared by defendant and the sample labels shown to the jury included this additional warning, but the jury was instructed that this warning was not on the containers used by Mr. Ferebee and was thus not relevant in this case.

[38] The jury was instructed that, although compliance with federal labelling requirements does not by itself immunize a seller from liability, such compliance was "a fact for you to consider in deciding whether the label is adequate."

H. *Absence of Expert Testimony on Inadequacy of Label*

"Expert testimony is required when the subject presented is so distinctly related to some science, profession, business or occupation as to be beyond the ken of the average lawman.'" *District of Columbia v. White*, 442 A.2d 159, 164 (D.C. 1982), *quoting Hughes v. District of Columbia*, 425 A.2d 1299, 1303 (D.C. 1981). Defendant cites this well-established principle in support of its argument that plaintiffs could not prevail in the absence of expert testimony on the adequacy of the label.

This argument is without merit. If defendant's proposed extension of the expert evidence rule were to be accepted, the entire premise of the American jury system would be undermined. The Court can think of no question more appropriately left to a common sense lay judgment than that of whether a written warning gets its message across to an average person. After all, it is to the layman that the warning is addressed, not to the expert on labelling.[39] *See Billiar v. Minnesota Mining & Mfg. Co.*, 623 F.2d at 247 (applying New York law).

Effective labelling is no doubt a recognizable area of expertise. However, even an expert on the subject can decide whether a label is adequate only by measuring the reactions of average people. In this case, the parties performed the same analysis with a verdict form.

I. *Misuse*

Finally, defendant argues that it cannot be held liable for Mr. Ferebee's injury because he misused the product. *See* Restatement (Second) of Torts § 402(A) comment j. Defendant had the burden of proof on this issue, and it

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[39] Defendant argued that Mr. Ferebee, as an agricultural worker, was a more sophisticated user than the average person. However, Mr. Ferebee was a manual laborer, and there is no evidence that he had any special training or experience that might have given the message on the label special significance.

is impossible for the Court to say that this burden was met as a matter of law.

Defendant pointed to the fact that the label gave instruction for use that would, if followed, have most likely prevented Mr. Ferebee's injury.[40] Since Mr. Ferebee did not follow all of these instructions when spraying outside, defendant argues that Mr. Ferebee misused the product.

The defendant is correct that one element of an adequate warning in this case would be a description of the precautions necessary to avoid the injury. But these instructions are effective only if the user knows what the result will be if he fails to follow them. *Billiar v. Minnesota Mining & Mfg. Co.*, 623 F.2d at 247; *D'Arienzo v. Clairol, Inc., supra; Boyl v. California Chemical Co.*, 221 F.Supp. 699 (D.Ore. 1963). If Mr. Ferebee was not warned that dermal exposure could seriously injure and even kill him, his failure to prevent that exposure cannot be deemed misuse. *See* Restatement (Second) of Torts § 402A comment n.

III. *Conclusion*

The standard for granting a judgment notwithstanding the verdict is a very strict one. *Boutros v. Riggs National Bank*, 655 F.2d 1257 (D.C.Cir.1981); *Law v. Virginia Stage Lines, Inc.*, 444 F.2d 990 (D.C.Cir.1971). Plaintiffs are entitled to all reasonable inferences that can fairly be drawn from the evidence. The Court is satisfied that there is more than sufficient evidence to support the jury's finding that plaintiffs established each and every element of their case by a preponderance of the evidence and that, at the close of all the evidence,

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[40] For example, the label advised the user spraying paraquat to wear waterproof clothing and goggles, to avoid working in spray mist, and to wash splashes on the skin or eyes immediately with water.

plaintiffs prevailed both on these issues and on the question of misuse. Accordingly, it is this 20th day of December, 1982, hereby

ORDERED: that defendant's motion for judgment notwithstanding the verdict should be, and hereby is, DENIED.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 81-01129

No. 83-1106

RICHARD LEANDER FEREBEE, JR., *et al.*

v.

CHEVRON CHEMICAL COMPANY,
Appellant

Appeal from the United States District Court
for the District of Columbia

Before: WALD and MIKVA, Circuit Judges, and BAZELON, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the Opinion of the Court filed herein this date.

Per Curiam

For The Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: June 12, 1984

Opinion for the Court filed by Circuit Judge Mikva.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 81-01129

No. 83-1106

RICHARD LEANDER FEREBEE

v.

CHEVRON CHEMICAL COMPANY,
Appellant

[Filed Aug. 14, 1984]

Before: WALD and MIKVA, Circuit Judges, and BAZELON, Senior Circuit Judge.

ORDER

On consideration of the Petition for Rehearing of Appellant it is

ORDERED by the Court that the aforesaid Petition for Rehearing is denied.

Per Curiam

For The Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 81-01129

No. 83-1106

RICHARD LEANDER FEREBEE

v.

CHEVRON CHEMICAL COMPANY,
Appellant

[Filed Aug. 14, 1984]

Before: ROBINSON, Chief Judge; WRIGHT, TAMM, WILKEY, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA and STARR, Circuit Judges.

ORDER

The Suggestion for Rehearing *en banc* of Appellant, filed July 11, 1984, has been circulated to the full Court and a majority of the Judges in regular active service have not voted in favor thereof. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid Suggestion is denied.

Per Curiam

For The Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judges Wilkey, Bork and Scalia would grant the suggestion for rehearing *en banc*.